# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 858. ~~513~~ ~~232~~ 3

THE IRON SILVER MINING COMPANY, PLAINTIFF IN ERROR,

*vs.*

THE MIKE AND STARR GOLD AND SILVER MINING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED MARCH 13, 1886.

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1 Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

Be it remembered that heretofore and on, to wit, the 1st day of July, A. D. 1885, came G. G. Symes, Esq., an attorney of said court, and filed in said court a transcript of proceedings heretofore had in the district court of the fifth judicial district of the State of Colorado, sitting within and for the county of Lake, in a certain cause in said district court lately pending, wherein The Iron Silver Mining Company was plaintiff and The Mike and Starr Gold and Silver Mining Company was defendant, and the said transcript is in words and figures as follows, to wit:

*Transcript.*

STATE OF COLORADO, } ss:
*County of Lake,* }

In the District Court of the Fifth Judicial District within and for said County of Lake.

THE IRON SILVER MINING COMPANY, a Corporation,

*against*

THE MIKE AND STARR GOLD AND SILVER MINING COMPANY, a Corporation.

2 The said plaintiff, The Iron Silver Mining Company, complains of the said defendant, The Mike and Starr Gold and Silver Mining Company, and for cause of action alleges—

That the said plaintiff is a corporation duly organized and created under the laws of the State of New York and has complied with the statutes of the State of Colorado so as to entitle it to do business and prosecute suits and actions in this State.

That the said defendant is a corporation created and organized under the laws of the State of New York and doing business and carrying on business in the State of Colorado.

That on the first day of January, A. D. 1884, the said plaintiff company was, and long before that time had been and still is, the owner of and seized and possessed of that certain tract of land and mining claim situated in California mining district, county of Lake, and State of Colorado, and known and called the William Moyer placer, consisting of fifty-six and sixty-nine one-hundredths (56.69) acres of land, more or less, and particularly described by metes and bounds as follows, namely:

"Beginning at corner No. 1, a porphyry stone 5 x 6 x 9 inches in size, marked 1–300, the same being corner No. 1 of survey No. 281, patented to Thos. S. Wells and Wm. Moyer with their placer claim, from which U. S. locating monument No. 1 bears north seventy-three (73) degrees one (1) minute and thirty-six (36) seconds west at the distance of ten thousand eight hundred and seventy and six-tenths (10,870.6) feet, and U. S. locating monument No. 11 bears north thirty-two (32) degrees thirty (30) minutes and forty-five (45) seconds west at the distance of thirty-six hundred and seventy-one and four-tenths (3,671.4) feet; thence from said corner No. 1 south ten

(10) feet to road sixty-five (65) feet to north bank of California
3 gulch one hundred feet (100) to stream in said gulch one hundred and fifty (150) feet to south bank of said gulch four hundred and seventy-four and nine-tenths (474.9) feet to corner No. 2, a porphyry stone 6 x 9 x 14 inches in size, marked 2–300, the same being corner No. 34 of said survey No. 281; thence west one hundred and eighty-nine and three-tenths (189.3) feet to corner No. 3, a porphyry stone 6 x 12 x 16 inches in size, marked 3–300, the same being corner No. 33 of said survey No. 281; thence south forty-six (46) degrees west one hundred and twenty-one and five-tenths (121.5) feet to corner No. 4, a quartz rock 7 x 8 x 16 inches in size, marked 4–300, from which a blazed pine tree ten (10) inches in diameter, marked 4–300, bears north twenty-three (23) degrees eight (8) minutes east at the distance of sixteen and three-tenths (16.3) feet, and a blazed pine tree fourteen (14) inches in diameter, marked 4–300, bears north seventy-six (76) degrees thirty (30) minutes west at the distance of fourteen and seven-tenths (14.7) feet; thence from said corner No. 4 north sixteen (16) degrees twenty-two (22) minutes west two hundred and sixty-three and five-tenths (263.5) feet to south bank of California gulch three hundred and ninety-eight and five-tenths (398.5) feet to north bank of said gulch four hundred and two and five-tenths (402.5) feet to road four hundred and sixty and five-tenths (460.5) feet to corner No. 5, a quartz stone 5 x 13 x 17 inches in size, marked 5–300; thence north forty-six (46) degrees nineteen minutes east forty-one (41) feet to corner No. 6, a porphyry stone 5 x 11 x 18 inches in size, marked 6–300, the same being corner No. 20 of survey No. 275, made for the placer claim of
4 Wm. H. Stevens and Levi Z. Leiter; thence north three thousand (3,000) feet to corner No. 7, a porphyry rock 6 x 9 x 13 inches in size, marked 7–300, from which a blazed pine tree seven (7) inches in diameter, marked 7–300, bears south eighty-seven (87) degrees east at the distance of ten (10) feet, and a blazed pine tree nine (9) inches in diameter, marked 7–300, bears south two (2) degrees forty (40) minutes east at the distance of twenty-six and five-tenths (26.5) feet; thence from corner No. 7 south seventy-three (73) degrees forty-one (41) minues east five hundred and ninety and six-tenths (590.6) feet to corner No. 8, a porphyry stone 6 x 12 x 16 inches in size, marked 8–300, from which a blazed pine tree nine (9) inches in diameter bears south eighty-six (86) degrees ten (10) minutes west at the distance of twenty and five-tenths (20.5) feet, and a blazed pine tree eight (8) inches in diameter, marked 8–300, bears south three (3) degrees thirteen (13) minutes west at the distance of thirty-four and one-tenth (34.1) feet; thence from said corner No. 8 south eleven (11) degrees east twenty hundred and forty-six and five-tenths (2,046.5 feet to corner No. 9, a granite stone 3 x 9 x 14 inches in size, marked 9–300, from which a blazed pine tree twelve (12) inches in diameter, marked 9–300, bears north twenty-six (26) degrees west at the distance of sixteen and eight-tenths (16.8) feet, and a blazed pine tree twelve inches in diameter, marked 9–300, bears south eighty-two (82) degrees fifty (50) minutes west at the distance of eleven and five-tenths (11.5) feet; thence from said corner No. 9 south eight hundred and

forty-four (844) feet to corner No. 10, a quartz rock 8 x 13 x 17 inches in size, marked 10–300, the same being corner No. 2 of said survey No. 281; thence north seventy-nine (79) degrees twenty-eight (28) minutes west five hundred and ninety and five-tenths (590.5) feet
5 to the place of beginning, together with all the mineral-bearing earth, rock, metals, and valuables of every kind and nature contained within the said tract of land.

That the said plaintiff company claims an estate of inheritance in fee-simple in the said land and premises.

That the said plaintiff company is now, and was at the times above and hereinafter mentioned, entitled to the immediate and exclusive possession of the above-described land and premises.

That while the said plaintiff company was so the owner of and seized and possessed and entitled to the possession of the said land and premises the said defendant afterwards and on, to wit, the first day of December, 1884, entered upon the said placer claim, land, and premises, and then and there wrongfully and unlawfully took possession of the said land and premises, and ousted the plaintiff company therefrom, and from thence hitherto has wrongfully and unlawfully retained and withheld, and still does wrongfully and unlawfully withhold and detain, the said premises and the possession thereof from the said plaintiff company.

That the value of the said mining claim, land, and premises from which the plaintiff has been so ousted by the said defendant, and which said defendant still unlawfully detains from the said plaintiff, is over twenty thousand dollars ($20,000.00), and that the rents, issues, and profits thereof, while the said defendant has so taken and held possession of the same, and the damages caused by such detention are over five thousand dollars ($5,000.00), and the plaintiff company thereby — been damaged in the sum of five thousand dollars ($5,000).

Wherefore plaintiff company demands judgment against
6 said defendant company (1) for the recovery of the possession of the said demanded premises, and (2) for the sum of five thousand dollars ($5,000.00) damages, and (3) for the costs of this action.

G. G. SYMES,
*Att'y for Pl'ff Co.*

(Indorsed:) No. 3044. In district court of Lake county. The Iron Silver Mining Co. *vs.* The Mike and Starr Gold and Silver Mining Co. Complaint. "William Moyer placer *vs.* Gardner lode." Filed February 20th, 1885. J. H. Playter, clerk, by Thos. W. Leonard, D. C. G. G. Symes, att'y for pl'ff.

November Term, A. D. 1884.

THE IRON SILVER MINING COMPANY, Plaintiff,
*vs.*
THE MIKE AND STARR GOLD AND SILVER MINING COMPANY, Defendant. } No. 2044.

TUESDAY, *February 24th A. D.* 1885.

Now on this day comes Frank W. Owers, Esq., and enters his appearance as attorney for and on behalf of the plaintiff herein.

*Summons.*

STATE OF COLORADO, } *ss:*
*County of Lake,* }

In the District Court of the Fifth Judicial District of the State of Colorado in and for the County of Lake.

7 THE IRON SILVER MINING COMPANY, a Corporation, Plaintiff,

*vs.*

THE MIKE AND STARR GOLD AND SILVER MINING COMPANY, a Corporation, Defendant.

The people of the State of Colorado send greeting to the defendant above named:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the fifth judicial district of the State of Colorado in and for the county of Lake, and to answer the complaint filed therein within ten days, exclusive of the day of service, if served within the county, or, if served out of this county but in this district, within twenty days; otherwise within forty days, or judgment by default will be taken against you according to the prayer of the complaint.

The said action is brought to recover possession of the William Moyer placer mining claim, situate, lying, and being in the California mining district, county of Lake, and State of Colorado, the same being known and designated as U. S. survey No. 281, as against the Gardner lode mining claim, for the sum of $5,000.00 damages for the unlawful detention thereof and for costs of suit, as will more fully appear by the complaint on file herein, to which reference is here made.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff
8 will apply to the court for the relief demanded in the complaint.

Given under my hand and the seal of the district court of the fifth judicial district of the State of Colorado in and for the county of Lake this 20th day of February, A. D. 1885.

[SEAL.] (S'g'd) J. H. PLAYTER, *Clerk*,
By THOS. W. LEONARD,
*Deputy Clerk.*

STATE OF COLORADO, } ss:
*County of Lake,* }

I do hereby certify that I have duly executed the within summons on this 20th day of February, A. D. 1885, by personally delivering a true copy to H. E. Wood, as the agent and manager of the within-named defendant company—no other officer being found in my county, neither president, vice-president, or secretary or treaurer—in the city of Leadville, county and State aforesaid.

(S'g'd) PETER BECKER, *Sheriff,*
By F. McLISTER, *Deputy.*

(Endorsed:) No. 3044. Iron Silver Mining Company, plaintiff, *vs.* The Mike and Starr Gold & Silver Min. Co., defendant. Summons. District court. Filed this 25th day of Feb'y, A. D. 1885. J. H. Playter, clerk. G. G. Symes, attorney for plaintiff.

STATE OF COLORADO, } ss:
*County of Lake,* }

In the District Court of the Fifth Judicial District in and for said County and State.

THE IRON SILVER MINING COMPANY, a Corporation, Plaintiff,

*vs.*

THE MIKE AND STARR GOLD AND SILVER MINING COMPANY, a Corporation, Defendant.

The said defendant, The Mike and Starr Gold and Silver Mining Company, admits that the said plaintiff is a corporation, and that the said defendant is a corporation, both organized and existing under the laws of the State of New York and carrying on business in the State of Colorado.

Denies that the plaintiff was, on the first day of January, A. D. 1884, or at any time since then or now is, the owner or seized or possessed of the said premises described as the William Moyer placer claim, except as hereinafter stated; denies that the plaintiff was, at said date or at any time, entitled to the exclusive possession of said premises; denies that the defendant on said day, or at any other time, took possession of the said premises or ousted the said plaintiff therefrom, except as hereinafter stated, and denies that the said defendant has wrongfully or illegally withheld or detained the said premises, or any portion thereof, from the plaintiff, and denies that the plaintiff has been damaged in any sum whatever by the acts of the defendant.

Said defendant alleges that on the 30th day of January, A. D. 1880, the said William Moyer placer claim, as such, was by the Government of the United States conveyed to the said William Moyer, which premises are described and known as survey No. 300, and that said Moyer afterwards conveyed the said premises to the plaintiff herein; that said grant of the said William Moyer placer claim contained the following reservation:

"That the grant hereby made is restricted in its exterior limits to the boundaries of the said lot No. 300, as hereinbefore described, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits which may have been discovered within said limits subsequent to said date, and not claimed or known to exist at the date hereof."

"Second. That should any vein or lode of quartz or other rock in in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits be claimed or known to exist within the above-described premises at the date hereof the same is expressly excepted and excluded from these presents."

The defendant alleges that at the time of the location of the said placer claim and the survey thereof, and at the time of the application for said patent, and at the time of the entry of said land thereunder, and at the date of the issuance and granting of said patent, a lode, vein, and deposit of mineral, of quartz, and other rock in place carrying carbonates of lead and silver was known to exist and
was claimed within the boundaries of said William Moyer
11 placer claim, survey No. 300, and the fact that said vein was claimed and did exist within said premises was known to the said William Moyer the patentee of said claim at all the times hereinbefore mentioned.

Defendant alleges that said vein was known and claimed as the Gardner lode, and defendant alleges that on the first day of February, A. D. 1879, Maurice Hayes, John Hayes, Geo. C. Gardner, and R. E. Goodell, who were then citizens of the United States, went upon the premises hereinafter described as the Gardner lode and sunk a shaft and run a tunnel and adit thereon, which uncovered and exposed said vein, lode, and deposit, and thereupon proceeded to and did locate the same as a lode claim by erecting a notice containing the name of the lode, the date of location, and their own names as locators, and marked the surface boundaries by posts, and afterwards caused to be filed a location certificate containing the name of the lode, to wit: The Gardner, the names of the locators, and the date of location and the number of feet in length claimed on each side of the center of the discovery shaft, and that said Gardner lode is more particularly described by metes and bounds as follows, to wit:

Beginning at corner No. 1, being same as corner No. 4 of the Goodell lode, and running thence N. 11° W. 750 feet to stake, being same as west center side stake of Goodell lode, 1,500 feet to corner No. 2, being same as corner No. 3 of Goodell lode; thence S. 79° W. 300 feet to corner No. 3; thence S. 11° E. 750 ft. to stake, being stake over discovery tunnel and west center side stake of claim, 1,500 feet to corner No. 4; thence N. 79° E. 300 ft. to corner No. 1 and
place of beginning.
12 Whereby said locators became and were by virtue of said discovery and location the owners of and entitled to the possession of said Gardner lode.

And said defendant alleges that the said locators and their grantees have ever since possessed and worked said Gardner lode and that

the working and occupying the same as aforesaid constitute the trespasses complained of in said complaint.

That afterwards by several mesne conveyances the title to said premises became, was, and is vested in this defendant.

Defendant, for a further answer to the complaint herein filed, alleges that the said vein, upon which the said defendant has been working and upon which it is now at work, is a well-defined vein of quartz and other rock bearing silver and other valuable metals in rock in place, and that the same was discovered and located by Maurice Hays, John Hays, and Thomas Starr on the 9th day of November, A. D. 1877, and immediately upon the discovery of said lode the said locators caused a shaft to be sunk thereon to the depth of more than ten feet below the surface at the lowest rim of the discovery shaft, and within three months thereafter located the same by marking the boundaries with six substantial posts and filing in the office of the clerk and recorder of Lake county, in which said claim is situate, a certificate of location, which said certificate contained the name of the lode, the name of the locators, the date of location, the number of feet in length claimed on each side of the center of the discovery shaft, and the general course and direction of said claim as near as may be; that in said location certificate and upon the location stake of said claim the same was called the Mike lode; that said Mike lode is more particularly described by
13 metes and bounds as follows, to wit:

Beginning at corner No. 1, a pine post set in a mound of stones on the divide between Nuggett and California gulches, from which a blazed pine 16″ diameter bears S. 11° 45′ W. 21.5 ft. (variation in all courses 15 degrees east), and Mt. Elbert bears S. 57° W., and discovery shaft bears S. 55° 15′ W. 163.9 ft., and running thence from corner No. 1 S. 11° E. 750 ft. to stake 1,500 ft. to corner No. 2; thence S. 79° W. 300 ft. to cor. No. 3; thence N. 11° W. 750 ft. to stake 1,500 feet to corner No. 4; thence N. 79° E. 300 ft. to cor. No. 1, the place of beginning.

That afterwards, and by conveyances from said locators and their grantees, the said property became, was, and is vested in this defendant, who is now the owner of said Mike lode.

That said defendant and its grantors have, ever since the location aforesaid, been, and now are, in possession of said vein, working and mining the same.

And the defendant further alleges that the work done by it, as aforesaid, upon said lode and vein is the supposed trespasses in said complaint mentioned.

Wherefore defendant prays to be hence dismissed, with his costs in this behalf sustained.

CLINTON REED.
*Attorney for Defendant.*

[Indorsed:] 3044. Iron Silver Mining Co. *vs.* Mike & Starr Gold and Silver Min'g Co. Answer. Filed April 22d, 1885. J. H. Playter, clerk, by Thos. W. Leonard, D. C. Clinton Reed, for defendant.

STATE OF COLORADO, }
*County of Lake,* } *ss:*

14 In the District Court of the Fifth Judicial District in and for said County and State.

THE IRON SILVER MINING COMPANY, a Corporation, &c.,
*vs.*
THE MIKE AND STARR GOLD AND SILVER MINING COMPANY, a Corporation, &c.

To the said hon. district court:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

Your petitioner further states that the said suit is one arising under the Constitution and laws of the United States, and that the determination of the controversy and the legal rights and titles of the parties therein depends upon the construction given to sections 2333, 2329, 2319, 2320, 2325, and 2326 of the Revised Statutes of the United States.

That on the 13th day of November, A. D. 1878, one William Moyer, being then in possession of the tract of land and placer mining claim, in California mining district, in the county of Lake and State of Colorado, consisting of fifty-nine and sixty-nine one hundredths (59.69) acres, more or less, called the William Moyer placer mining claim, made application to the United States land office to enter and purchase same, and such proceedings were had in accordance with the acts of Congress in such cases; that
15 on the first day of February, 1879, said Moyer entered and paid for said placer claim, and thereafter, and on the 30th day of January, 1880, a United States patent for said premises was issued and delivered, whereby the said William Moyer became the owner in fee of the said tract of land particularly described by metes and bounds in the said United States patent, and also described in the complaint in this suit.

That the United States, by virtue of the said placer patent, conveyed to the said patentee all valuable mineral and other deposits within the boundaries of said patented placer claim of every kind and nature.

And your petitioner avers and contends that in and by the granting clauses of said placer patent, and also in and by the exceptions, restrictions, and reservations in said patent and by virtue of the provisions of sections 2319, 2320, 2325, 2326, 2329, and 2333 of the Revised Statutes of the United States, the United States did grant and convey to said patentee, William Moyer, all veins or lodes of quartz or other rock in place and all mineral deposits of every kind and nature, including all the lodes and veins of rock in place which had not been discovered, located, and recorded and held in accordance with the local laws and acts of Congress which provided for locating and granting possessory title to mining claims before the date of said application for said placer patent.

And your petitioner avers that at the date of such application for said patent, to wit, the 13th day of November, 1878, no lodes or veins of quartz or other rock in place were known to exist, and no lode or vein or any lode-mining claim had been discovered, located, or recorded within the exterior boundaries of said placer claim.

16 And the said defendant company, or its grantors or predecessors in interest, had not at or before the 13th day of November, 1878, discovered or located or recorded any lode or vein or quartz or other rock in place bearing gold, silver, lead, or other valuable deposits, and had not at or before that time claimed in any way any vein or lode of quartz to exist within the boundaries of said placer claim or patented premises.

That on the 24th day of January, 1880, the said patentee, William Moyer, by his deed of that date, duly executed and delivered, conveyed to Wm. H. Stevens and Levi Z. Leiter all the above-described land and premises, and all the right, title, and interest which he held and might thereafter obtain from the United States by virtue of the issuing of the said placer patent; and on the 6th day of March, 1880, the said Stevens and Leiter, by their deed of that date, duly executed and delivered, conveyed the said premises to your petitioner.

Your petitioner shows that long after the application for the said placer patent was made, as hereinabove set forth, the said defendant company and its grantors and predecessors in interest went upon and within the said patented premises and pretended to claim and locate the so-called "Gardner" lode mining claim, and since said time have been holding possession [of] and claim [ing] title to that part of said patented placer mining premises by virtue of their pretended discovery, location, and record of the said "Gardner" lode miniug claim.

That on the 13th day of April, 1881, the said defendant company made application in the United States land office at Leadville to be allowed to enter and pay for the said "Gardner" lode mining claim, and your petitioner filed in the said land office its

17 adverse claim against said application for patent under the provisions of section 2326 of the Revised Statutes of the United States; and this suit is brought by your petitioner in support of the said adverse claim in pursuance of the United States statute in such case.

Your petitioner states that the controversy in this suit arises in regard to the operation and construction of said sections of the Revised Statutes of the United States.

Your petitioner contends that the said placer patent conveyed a legal title to all veins or lodes of quartz or other rock in place and all other mineral or other valuable deposits within the boundaries of said patented premises, and also conveyed and granted the exclusive right and enjoyment of all mining privileges and hereditaments and all placer and lode deposits of rock in place found or discovered, or thereafter to be found or discovered or developed,

within the said patented premises, and that any person or persons that have gone on to said premises since the date of application for the said placer patent are trespassers, and have acquired and can acquire no legal right whatever within the said premises.

That any exceptions or reservations in the said placer patent, or in pursuance of said section 2333 of the Revised Statutes of the United States, apply only to third parties who had discovered, located, and recorded lode mining claims in accordance with the State and United States Statutes before the date of the application for the said placer patent.

Your petitioner further shows that the said defendant company contends that the said placer patent did not and does not convey to the patentee therein, or his grantors, any legal title or rights to lodes or veins of quartz or other rock in place carrying gold,
18 silver, lead, or other valuable deposits, and that defendant company and its predecessors in interest had and have the right to go within the said patented premises and discover and develop, locate and hold, lode mining claims which contain veins or lodes of quartz or other rock in place, and contend that the said so-called "Gardner" lode mining claim does contain a lode or vein of quartz or other rock in place.

That the legal rights and titles of the respective parties to this suit depend wholly upon the construction and application given to said sections of the Revised Statutes of the United States in their application to the matters and facts herein set forth.

That if the court shall decide, as contended by the plaintiff company and petitioner, that the said section of the Revised Statutes of the United States, and the reservation and exception clauses in the said patent, applies only to lode mining claims containing lodes or veins of quartz or other rock in place which had been discovered, located, and recorded within the boundaries of the placer claim before the date of application for the placer patent, then the said plaintiff must recover in this action, because the said pretended "Gardner" lode mining claim was not discovered, located, or recorded until long after the application had been made for the said William Moyer placer patent.

But if the court shall decide, as contended by the said defendant company, that the said sections of the Revised Statutes, and the said reservation and exception clauses of the said placer patent, excepts and excludes from the grant of the said patent all veins or lodes of quartz or other rock in place or all lode mining
19 claims, although located upon such veins or rock in place after the date of application for the placer patent, or after the date of entry or issuing the placer patent, and that parties have the right, after a placer patent has been applied for or is issued, to go within the the boundaries of a patented placer claim and discover lodes or veins and locate and record lode mining claims, then the defendant company must recover in this action.

And the decision of the whole controversy in this suit depends upon the construction given to the said sections of the Revised Statutes and the said placer patent issued in accordance therewith.

And your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And it prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for said district of Colorado. And it will ever pray.

G. G. SYMES,
*Att'y for Pl'ff & Petitioner.*

STATE OF COLORADO, } ss:
*Arapahoe County,* }

I, George G. Symes, being duly sworn, do say that I am the attorney for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

(Signed) G. G. SYMES.

Subscribed and sworn to before me this 16th day of April, 1885.

[SEAL.] FRANK A. UHLAND,
*Notary Public.*

(Indorsed:) No. 3044. In the district court of Lake county. The Iron Silver Mining Co. *vs.* The Mike and Starr G. & S. M. Co. Petition for removal to U. S. cir. court. "Gardner lode." Filed April 22d, 1885. J. H. Playter, clerk, by Thos. W. Leonard, D. C.

Know all men by these presents that George G. Symes and W. Arens are held and firmly bound unto the Mike and Starr Gold and Silver Mining Company in the penal sum of five hundred dollars, the payment whereof, well and truly to be made unto the said The Mike and Starr Gold and Silver Mining Company, its successors and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents—

Yet, upon these conditions: The said The Iron Silver Mining Company having petitioned the district court of Lake county, State of Colorado, for the removal of a certain cause therein pending, wherein The Iron Silver Mining Company is plaintiff and The Mike and Starr Gold and Silver Mining Company is defendant, to the circuit court of the United States in and for the district of Colorado:

Now, if the said The Iron Silver Mining Company, your petitioner, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this — day of April, A. D. 1885.

[SEAL.] G. G. SYMES.
[SEAL.] W. ARENS.

(Endorsed:) No. 3044. The Iron Silver Mining Company *vs.* The Mike and Starr Gold and Silver Mining Co. Bond for removal to U. S. circuit court. Filed April 22d, 1885. J. H. Playter, clerk, by Thos. W. Leonard, D. C.

March Term, A. D. 1885.

THE IRON SILVER MINING COMPANY, Plaintiff,
*vs.*
THE MIKE AND STARR GOLD AND SILVER MINING COMPANY, Defendant. } No. 3044.

TUESDAY, *May* 26, *A. D.* 1885.

22 Now, on this day comes the plaintiff herein, by Frank W. Owers, Esq., its attorney, and presents to the court the petition and bond heretofore filed herein for the removal of this cause to the circuit court of the United States for the district of Colorado, and moves the court to grant the same.

And it appearing therefrom that the amount in controversy in this action exceeds, exclusive of costs, the sum or value of five hundred dollars ($500.00); that this action is one arising under the Constitution and laws of the United States, and it will, upon the trial of the same, require the construction of such Constitution and laws, and that this is the first term of this court at which a trial of this case could be had; and it further appearing to the court that the bond presented by said plaintiff for such removal is in proper form, and that the surety thereon is good and sufficient for that purpose, said motion is now by the court sustained.

It is, therefore, now by the court considered, ordered, and adjudged that the bond of plaintiff for such removal be, and the same is hereby, approved; that this cause be, and the same is hereby, removed to the circuit court of the United States for the district of Colorado, and that the clerk of this court prepare and certify a transcript of all papers filed and all orders of court made and entered of record in this action upon payment of all costs remaining due and unpaid herein.

STATE OF COLORADO, } *ss:*
*County of Lake,* }

23 I, Jos. H. Playter, clerk of the district court of the fifth judicial district of the State of Colorado, sitting within and for the county of Lake, in said State, do hereby certify that the above and foregoing are true, full, and correct copies of all papers filed and orders of court made and entered of record in the therein entitled action, the same making a full and complete transcript of the record in said cause, as fully as the same now remain on file and of record in my office, and that the foregoing is a true and correct statement of the costs thereon.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at my office in the city of Leadville, on this 11th day of June, A. D. 1885.

[Seal Dist. C't, Lake Co., Colo.]

(S'g'd) J. H. PLAYTER, *Clerk*,
By THOS. W. LEONARD,
*Deputy Clerk.*

(Endorsed :) No. 1767. The Iron Silver Mining Company *vs.* The Mike and Starr Gold and Silver Min. Co. Transcript from district court, Lake Co. Filed July 1, 1885. (S'g'd) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 15th day of October, A. D. 1885, came the said plaintiff, by Messrs. G. G. Symes and Frank W. Owers, its attorneys, and filed in said court and in said cause its replication to the answer heretofore filed herein, and the said replication is in words and figures as follows, to wit:

*Replication.*

24 UNITED STATES OF AMERICA, } *ss:*
*District of Colorado,* }

In the Circuit Court of the United States within and for the District of Colorado.

THE IRON SILVER MINING COMPANY, a Corporation, Plaintiff,

*vs.*

THE MIKE AND STARR GOLD AND SILVER MINING COMPANY, a Corporation, Defendant.

Now comes the said plaintiff company, and, for reply to the answer of said defendants herein, denies that at the time of the location of the said placer claim, or at the time of the survey thereof, or at the time of the application for the said placer patent, or at the time of the entry of said land, or at the time of the issuing or granting of said patent, there was a load, vein, or deposit of mineral or rock in place carrying any carbonates of lead or any silver ore of great or any value that was known to exist or was claimed to exist within the boundaries or underneath the surface of the said patented premises, and denies that any vein or lode or mineral deposit or rock in place of any kind or character was claimed to exist or was known to exist within said premises by the said patentees of the said placer claim, or by any other person or persons, at the time in the said answer mentioned or at any time before the said location, application,
25 or entry or issuing of the said placer patent; denies that any vein or lode or ledge, or valuable mineral deposit of rock in place of any kind or character was excluded, or expressly or otherwise excepted, from the said patent or from the said grant of the said premises in or by the said patent; denies that the said William Moyer, patentee as aforesaid and grantor of plaintiff, made application for said patent or acquired the same for the purpose of obtaining title to any vein, lode, lead, ledge, or valuable mineral de-

posit of metalliferous rock in place; and denies that the work done upon said premises by the plaintiff company or its grantors was done on veins or deposits of metalliferous rock in place; and denies that no work has been done on any placer deposit within the boundaries of said patented premises.

Plaintiff denies that any vein was known or claimed within the boundaries of the said William Moyer placer as the Gardiner or any lode; and plaintiff denies that on the first day of February, A. D. 1879, or at any time before or since, Morris Hayes, John Hayes, George C. Gardiner, and R. E. Goodell, each or any or either of them, went upon the premises in the said answer described as the Gardiner lode, and sank a shaft or ran a tunnel and adit thereon which uncovered or exposed any vein, lead, lode, ledge, or deposit of metalliferous rock in place; denies that the said Morris Hayes, John Hayes, George C. Gardiner, and R. E. Goodell were at said time, or at any time before or since have been or are now citizens of the United States; denies that they or either of them ever proceeded to
26 or did locate the said described premises as a lode claim by erecting a notice or any notice containing the name of the lode or any lode, the date of location or any date, their own names or the names of either of them as locators; and denies that they or either of them marked the surface boundaries by posts or in any manner; and denies that they or either of them afterwards caused to be filed or filed at any time a location certificate or any certificate containing the name of the lode or any name, the names of the locators, or any or either of them, the date of location or any date, or any matter or thing whatsoever.

Denies that the premises in the said answer described as the Gardiner lode ever constituted or does now constitute any lode mining claim.

Admits that at some time since the location of the said placer, and since the application for patent of the same, and since the issuance of said patent, the defendant did attempt to locate a pretended lode claim within the boundaries of the said patented premises; but denies that they acquired or could acquire any right or title of any kind whatever by any such pretended location of a lode mining claim upon or within the said patented premises; denies that they discovered or uncovered or exposed any vein, lead, lode, ledge, or deposit of metalliferous rock in place within the boundaries of said placer of any kind whatever, and alleges that the defendants are naked trespassers upon the said premises; denies that said defendants or their grantors, or any or either of them, ever became or were, by virtue of any pretended discovery or location, the owners of or entitled to the possession in any manner of the so-called Gardiner lode.

Plaintiff denies that the defendants or their grantors, or
27 any or either of them, have since such pretended location possessed or worked said Gardiner lode or any lode within the boundaries of said placer; denies that by virtue of several mesne conveyances or any conveyances the title to the said prem-

ises in the said answer described as the Gardiner lode ever became or was or is now vested in the defendants.

Denies that the said defendants are or have been at work on a well-defined vein of quartz and other rock-bearing silver or other valuable metals in rock in place, or upon any vein, lead, lode, ledge, or deposit of metaliferous rock in place; denies that any such vein, lead, lode, ledge, or deposit was ever discovered or located by Morris Hayes or John Hayes or Thomas Starr, or any or either of them, on the ninth day of November, A. D. 1877, or at any time before or since; and denies that at said time, or at any time before or since, the said Morris Hayes, John Hayes, and Thomas Starr, or any or either of them, ever caused a shaft or any shaft to be sunk thereon to the depth of ten feet or any depth; denies that within three months after said date, or at any time before or since, any location of any pretended claim was made by marking the boundaries with six or any stakes or by filing in the office of the clerk and recorder of Lake county or of any county a certificate of location or any certificate containing any matter whatsoever; denies that in said location certificate, or in any location certificate, or upon the location, or upon any stake, any location was called the Thomas Starr lode; denies that any lode called the Thomas Starr lode, as described by metes and bounds, or any metes and bounds, or in any manner as in said answer set forth or otherwise, was ever
28 located, or is now located; denies that afterwards, or at any time before or since, by conveyance or any conveyance by said Morris Hayes, John Hayes, and Thomas Starr, or any or either of them, the said property in the said answer described as the so-called Thomas Starr lode became or was or is vested in said defendants, or in any or either of them; denies that said defendants, or any or either of them, are now, or at any time before or since the filing of the complaint in this action —, the owners of said so-called Thomas Starr lode, or of any lode; and denies that said defendants or its grantors, or any or either of them, have at any time been or are now in the possession of the said so-called Thomas Starr lode; and denies that they are working or mining the same; and denies that any work done by defendants, or any or either of them, upon any vein, lead, lode, ledge, or deposit of metalliferous rock in place constitutes the trespasses in the complaint in this action mentioned.

And the plaintiff company avers that the said William Moyer, grantor and predecessor in interest of the plaintiff company, did on or about the 3rd day of July, A. D. 1878, by virtue of a compliance with the provisions of the act of Congress in such case made and provided, and by virtue of a compliance with the laws of the State of Colorado, locate the premises known as the William Moyer placer; that thereafter and on the 13th day of November, A. D. 1878, and in pursuance of the provisions of the act of Congress in such case made and provided, said Moyer made application to the United States land office to enter and pay for said premises described in the said complaint, and such proceedings were thereafter had in accordance with the said act of Congress; that on or about the 13 day

of January, A. D. 1879, the said William Moyer did enter
29 and pay for the said mineral land and premises, and did receive a duplicate receivers' receipt therefor; and such other proceedings were duly had that thereafter and on the 30th day of January, A. D. 1880, a United States patent was duly issued by the United States to the said William Moyer for the said premises.

And the plaintiff, for further and second reply to the said answer, alleges that at the time of the location and at the time of the application for the said placer patent in the said answer set forth and at the time of the entry and purchase of the said placer premises and at the time of the issuing of the said placer patent no lode mining claim of any kind or character had been discovered, located, or recorded, or initiated within the exterior boundaries of the said placer premises by the said defendants or their grantors or predecessors in interest, or any or either of them.

And plaintiff company, for a further reply to the said answer, alleges that at the time of the location of and application for the said placer patent and at the time of the entry and purchase of the said placer premises and at the time of the issuing of the said placer patent no lode mining claim of any kind or character had been discovered, located, recorded, or initiated within the exterior boundaries of the said placer claim and premises by the said plaintiff company or any of its grantors or predecessors in interest or by any person or persons whomsoever.

And the plaintiff company, for a further reply, avers that no top, outcrop, or apex, or any part of any vein, lode, lead, ledge, or mineral deposit of metalliferous rock in place of any kind or character has ever been discovered or exposed or cut or reached by the said defendants or their grantors or predecessors in interest,
30 or any or either of them, or by any other person or persons, within the boundaries of the said pretended lode mining claim claimed by the defendants, and no top, outcrop, or apex, or any part of any lode or vein or mineral deposit of metalliferous rock in place was ever claimed or known to exist within the said pretended lode mining claims, or any or either of them, or within the boundaries of the said Wm. Moyer placer.

Wherefore the plaintiff company prays judgment as it has by its said complaint heretofore prayed.

(S'g'd) G. G. SYMES,
FRANK W. OWERS,
*Sol's for Pl'ff.*

(Endorsed:) 1767. In U. S. circuit court. Iron Silver M. Co. *vs.* Mike & Starr G. & S. M. Co. Replication. Filed Oct. 15, 1885. (S'g'd) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 16th day of November, A. D. 1885, the same being one of the regular juridical days of the October term, A. D. 1885, of said court—present, the Honorable Moses

Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

*Order. Jury Trial.*

THE IRON SILVER MINING COMPANY
*vs.*
THE MIKE AND STARR GOLD AND SILVER MINING COMPANY. } 1767.

Action for possession of specific real property and for damages.

31 At this day comes the said plaintiff, by G. G. Symes, Esq., its attorney, and the said defendant, by Clinton Reed, Esq., its attorney, also comes.

And thereupon comes a jury, to wit, 1, D. S. Coffman; 2, J. W. Denio; 3, John H. Jones; 4, Charles E. Day; 5, Silas S. Kennedy; 6, James R. Ives; 7, Harry Williams; 8, Daniel M. Ostrander; 9, Paul H. Jones; 10, J. J. Boyd; 11, John F. Porter; 12, A. G. Breene, twelve good and lawful men, and they are duly selected and tried, impaneled and sworn, to well and truly try the issues herein joined, and a true verdict render according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors, being each duly cautioned by the court not to converse among themselves or with others touching this cause, or the matters at issue herein, or the evidence heard, or any part hereof, nor to listen to such conversation of others, are permitted to separate, to meet the court at its next incoming.

And afterwards and on, to wit, the 17th day of November, A. D. 1885, the same being one of the regular juridical days of the October term, A. D. 1885, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

*Order. Jury Trial. Finding for Defendants.*

32 THE IRON SILVER MINING COMPANY
*vs.*
THE MIKE AND STARR GOLD AND SILVER MINING COMPANY. } 1767.

Action for possession of specific real property and for damages.

At this day come again the said parties, by their attorneys, respectively, and the said jurors, having heard the evidence produced herein and the instructions of the court, retire to their room, under charge of a sworn bailiff, to consider of their verdict; and afterwards and on this same day come again the said jurors, and on their oaths do say they find for the defendants.

And afterwards and on, to wit, the 21st day of November, A. D. 1885, the same being one of the regular juridical days of the October term, A. D. 1885, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

*Order. Motion for New Trial Denied.*

THE IRON SILVER MINING COMPANY
*vs.*
THE MIKE AND STARR GOLD AND SILVER MINING COMPANY. } 1767.

Action for possession of specific real property and for damages.

At this day comes the said plaintiff, by G. G. Symes, Esq., its attorney, and the said defendant, by C. S. Thomas, Esq., its attorney, also comes.

33 And the motion of the said plaintiff for a new trial of the issues herein joined coming on now to be heard *is* submitted to the court, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

Wherefore, on motion of the said defendant, it is considered by the court that the said defendant go hence hereof without day, and have and recover of and from the said plaintiff its costs by it in this behalf laid out and expended, to be taxed, and have execution therefor.

And thereupon, on motion of the said plaintiff, it is ordered that the said plaintiff have day until sixty (60) days from this day to file herein its bill of the exceptions reserved by it upon the trial of the issues herein joined. It is further ordered that the bond upon writ of error herein shall be in the sum of one thousand dollars ($1,000)

And afterwards and on, to wit, the 5th day of December, A. D. 1885, came again the said plaintiff, by G. G. Symes, Esq., its attorney, and filed in said court and in said cause its bond, and sued out of said court a writ of error and citation to the Supreme Court of the United States, and the said bond is in words and figures as follows, to wit:

*Bond.*

THE UNITED STATES OF AMERICA, *District of Colorado:*

Know all men by these presents that John L. McNeil & J. C. Mitchell are held and firmly bound unto the Mike and Starr

34 Gold and Silver [Mining] Company in the full and just sum of one thousand dollars, to be paid to the said The Mike and Starr Gold and Silver Mining Company, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this —— day of ——, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately, at the October term, A. D. 1885, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between The Iron Silver Mining Company, —, and The Mike and Starr Gold and Silver Mining Company, defendant, judgment was rendered against the said The Iron Silver Mining Company, and the said The Iron Silver Mining Company having obtained a writ of error to reverse the judgment of the said court, and having filed a copy thereof in the office of the clerk of the said court, and a citation directed to the said The Mike and Starr Gold and Silver Mining Company citing and admonishing it to be and appear at a Supreme Court of the United States to be held at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Iron Silver Mining Company shall prosecute said writ of error to effect and answer all damages and costs if it fails to make good its plea, then the above obligation to be void; eise to remain in full force and virtue.

(S'g'd) JOHN L. McNEIL. [SEAL.]
JOHN C. MITCHELL. [SEAL.]

Approved.
(S'g'd) MOSES HALLETT, *Judge.*

35 *Justification.*

THE UNITED STATES OF AMERICA, } *ss:*
*District of Colorado,* }

John L. McNeil and J. C. Mitchell, sureties on the within bond, being each first duly sworn, deposes and saith that he is worth, in real estate and personal property, the sum below set opposite his name—that is to say, as to John L. McNeil, one thousand dollars; as to J. C. Mitchell, one thousand dollars—over and above all his just debts and liabilities, and in property subject to levy and sale upon execution.

(S'g'd) JOHN L. McNEIL.
JOHN C. MITCHELL.

Subscribed and sworn to before me this 2nd day of December, A. D. 1885.

[NOTARIAL SEAL.] (S'g'd) CHARLES C. HENDRIE,
*Notary Public.*

(Endorsed:) Gen. No. 1767. Circuit court of the United States, district of Colorado. The Iron Silver Mining Company *vs.* The Mike and Starr Gold and Silver Mining Company. Bond by pl'ff on writ of error, $1,000.00. Filed this 5 day of Dec'r, A. D. 1885. (S'g'd) Edward F. Bishop, clerk.

And the said writ of error is hereto attached, to wit:

*Writ of Error to Circuit Court U. S., District of Colorado.*

36 UNITED STATES OF AMERICA, *District of Colorado,* } ss:

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court, between The Iron Silver Mining Company and The Mike & Starr Gold & Silver Mining Company, a manifest error hath happened to the great damage of the said The Iron Silver Mining Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 21st day of November, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the 110th year.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk.*

Allowed by—
MOSES HALLETT, *Judge.*

36½ [Endorsed:] Gen. No. 1767. Circuit court of the United States, district of Colorado. The Iron Silver Mining Company, plaintiff in error, *vs.* The Mike and Starr Gold and Silver Mining Company. Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S. this 5 day of Dec'r, A. D. 1885. Edward F. Bishop, clerk. G. G. Symes, attorney for plaintiff in error.

*Return.*

THE UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In obedience to the command of the within writ I herewith transmit to the honorable circuit court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 9th day of March, A. D. 1886.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk.*

The plaintiff having served this writ of error by lodging a copy thereof for the adverse party in the clerk's office within sixty (60) days, Sundays inclusive, after the rendering of the judgment herein, and having given the security required by law on the issuing of the citation, this writ is therefore a supersedeas.

Teste: EDWARD F. BISHOP, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

37 And the said citation is hereto attached, to wit:

*Citation and Proof of Service.*

THE UNITED STATES OF AMERICA, *District of Colorado:*

38 U. S. Circuit Court.

The United States of America to the Mike and Starr Gold and Silver Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States in and for the district of Colorado, wherein The Iron Silver Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 21st day of November, in the year of our Lord one thousand eight hundred and eighty-five.

MOSES HALLETT, *Judge.*

38½ DENVER, *Dec. 5th*, 1885.

We hereby acknowledge service of true copy of within citation this day.

PATTERSON & THOMAS,
*For Def'ts.*

[Endorsed:] Gen. No. 1767. Circuit court of the United States, district of Colorado. The Iron Silver Mining Company, plaintiff in error, *vs.* The Mike and Starr Gold and Silver Mining Company, defendant in error. Citation. Filed in circuit court of the U. S. this 5th day of Dec'r, A. D. 1885. Edward F. Bishop, clerk. G. G. Symes, attorney for plainitff in error.

39 And afterwards and on, to wit, the 15th day of January, A. D. 1886, came again the said plaintiff, by its attorneys aforesaid, and filed in said court and in said cause its bill of the exceptions reserved by it upon the trial of the issues herein joined and its assignment of errors; and the said bill of exceptions is in words and figures as follows, to wit:

*Bill of Exceptions and Assignment of Errors.*

UNITED STATES OF AMERICA, *District of Colorado:*

In the Circuit Court of the United States for the District of Colorado, in the Eighth Judicial Circuit, at the General Term thereof, begun and holden in the City of Denver, in said District, on the First Tuesday of October, A. D. 1885.

Present: Hon. Moses Hallett, district judge, presiding.

THE IRON SILVER MINING COMPANY, Plaintiff,

*vs.*

THE MIKE AND STAR GOLD AND SILVER MINING COMPANY, Defendant.

Be it remembered that on the trial of this cause during the general term of this court, to wit, on the 16th day of November,
40 A. D. 1885, a jury having been duly empanelled and sworn, the plaintiff, to maintain the issues on its part, gave in evidence as follows—that is to say:

Plaintiff, by its counsel, offered in evidence a patent from the United States to William Moyer, dated January 30th, 1880, which was admitted by counsel for defendant to include the ground in dispute in this case, which was marked Plaintiff's Exhibit "A," and is in words and figures following, to wit:

General Land Office No., 3712. Mineral certificate No. 180.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, there have been deposited in the General Land Office of the United States the plat and field notes of survey of the placer mining claim of William Moyer, accompanied by the certificate of the register of the land office at Fairplay, in the State of Colorado, whereby it appears that, in pursuance of the said Revised Statutes of the United States, the said William Moyer did on the twenty-first day of February, A. D. 1879, enter and pay for said claim or premises, being mineral entry one hundred and eighty (180), in the series of said office, designated by the surveyor general as lot number three hundred (300) embracing a portion of the unsurveyed public domain in the California mining district, in the county of Lake and State of Colorado, in the district of lands subject to sale at Fairplay, now Leadville, contain-

ing thirty-six (36) acres and sixty-nine hundredths ($\frac{69}{100}$) of
41 an acre of land, more or less, and according to the returns on file in the general land office, bounded, described, and platted as follows, with magnetic variation at fifteen (15) degrees east, to wit:

Beginning at corner No. 1, a porphyry stone 5 x 6 x 9 inches in size, marked "1–300," the same being corner No. 1 of survey No. 281, patented to Thos. S. Wells and Wm. Moyer, with their placer claim, from which U. S. locating monument No. 1 bears north seventy-three (73) degrees one (1) minute and thirty-six (36) seconds west at the distance of ten thousand eight hundred and seventy and six-tenths (10,870.6) feet, and U. S. locating monument No. 11 bears north thirty-two (32) degrees thirty (30) minutes and forty-five (45) seconds west at the distance of thirty-six hundred and seventy-one and four-tenths (3,671.4) feet; thence from said corner No. 1 south ten (10) feet to road, sixty-five (65) feet to north bank of California gulch, one hundred (100) feet to stream in said gulch, one hundred and fifty (150) feet to south bank of said gulch, four hundred and seventy-four and nine-tenths (474.9) feet to corner No. 2, a porphyry stone 6 x 9 x 14 inches in size, marked "2–300," the same being corner No. 34 of said survey No. 281; thence west one hundred and eighty-nine and three-tenths (189.3) feet to corner No. 3, a porphyry stone 6 x 12 x 16 inches in size, marked "3–300," the same being corner No. 33 of said survey No. 281; thence south forty-six (46) degrees west one hundred and twenty-one and five-tenths (121.5) feet to corner No. 4, a quartz rock 7 x 8 x 16 inches in size, marked "4–300," from which a blazed pine tree ten (10) inches in diameter, marked "4–300" bears north twenty-three (23) degrees eight (8) minutes east at the distance of sixteen and three tenths (16.3)
42 feet, and a blazed pine tree, fourteen (14) inches in diameter, marked "4–300," bears north seventy-six (76) degrees thirty (30) minutes west at the distance of fourteen and seven-tenths (14.7) feet; thence from said corner No. 4 north (16) degrees twenty-two (22) minutes west two hundred and sixty-three and five-tenths (263.5) feet to south bank of California gulch, three hundred and ninety-eight and five-tenths (398.5) feet to north bank of said gulch, four hundred and two and five-tenths (402.5) feet to road, four hundred and sixty and five-tenths (460.5) feet, to corner No. 5, a quartz stone 5 x 13 x 17 inches in size, marked "5–300;" thence north forty-six (46) degrees nineteen (19) minutes east forty-one (41) feet to corner No. 6, a porphyry stone 5 x 11 x 18 inches in size, marked "6–300," the same being corner No. 20 of survey No. 275, made for the placer claim of Wm. H. Stevens and Levi Z. Leiter; thence north three thousand (3,000) feet to corner No. 7, a porphyry rock 6 x 9 x 13 inches in size, marked "7–300," from which a blazed pine tree, seven (7) inches in diameter, marked "7–300," bears south eighty-seven (87) degrees east at the distance of ten (10) feet, and a blazed pine tree nine (9) inches in diameter, marked "7–300," bears south two (2) degrees forty (40) minutes east at the distance of twenty-six and five-tenths (26.5) feet; thence from said corner No. 7 south seventy-three (73) degrees forty-one (41) minutes east five hundred and ninety and six-tenths (590.6) feet to corner No. 8,

a porphyry stone 6 x 12 x 16 inches in size, marked "8–300," from which a blazed pine tree, nine (9) inches in diameter, bears south eighty-six (86) degrees ten (10) minutes west at the distance of twenty and five-tenths (20.5) feet, and a blazed pine tree eight (8) inches in diameter, marked "8–300," bears south three (3)
43 degrees thirteen (13) minutes west at the distance of thirty-four and one-tenth (34.1) feet; thence from said corner No. 8 south eleven (11) degrees east twenty hundred and forty-six and five-tenths (2,046.5) feet to corner No. 9, a granite stone 8 x 9 x 14 inches in size, marked "9–300," from which a blazed pine tree, twelve (12) inches in diameter, marked "9–300," bears north twenty-six (26) degrees west at the distance of sixteen and eight-tenths (16.8) feet, and a blazed pine tree, twelve (12) inches in diameter, marked "9–300," bears south eighty-two (82) degrees fifty (50) minutes west at the distance of eleven and five-tenths (11.5) feet; thence from said corner No. 9 south eight hundred and forty-four (844) feet to corner No. 10, a quartz rock 8 x 13 x 17 inches in size, marked "10–300," the same being corner No. 2 of said survey No. 281; thence north seventy-nine (79) degrees twenty-eight (28) minutes west five hundred and ninety and five-tenths (590.5) feet to the place of beginning, containing fifty-six (56) and sixty-nine hundredths ($\frac{69}{100}$) of an acre of land, more or less, as represented by yellow shading in the following plat:

(Here follows diagram marked p. 44.)

45 Now, know ye that the United States of America, in consideration of the premises and in conformity with said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said William Moyer and to his heirs and assigns, the said placer mining premises above described as lot No. 300, embracing a portion of the unsurveyed public domain:

To have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said William Moyer and to his heirs and assigns forever; subject, nevertheless, to the following conditions and stipulations:

First. That the grant hereby made is restricted in its exterior limits to the boundaries of the said lot No. 300, as hereinbefore described, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits which may hereafter be discovered within said limits and which are not claimed or known to exist at the date thereof.

Second. That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits be claimed or known to exist within the above-described premises at the date hereof the same is expressly excepted and excluded from these presents.

Third. That the premises hereby conveyed may be entered by the proprietor of any vein or lode of quartz or other rock in place bear-

ing gold, silver, cinnabar, lead, tin, copper, or other valuable
46 deposits for the purpose of extracting and removing the ore from such vein, lode, or deposit should the same, or any part thereof, be found to penetrate, intersect, pass through, or dip into the mining ground or premises hereby granted.

Fourth. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts.

Fifth. That in the absence of necessary legislation by Congress the Legislature of Colorado may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to the complete development thereof.

In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the thirtieth day of January, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

By the President: R. B. HAYES,
By WM. H. CROOK, *Secretary.*

[Seal United States General Land Office.]

S. W. CLARK,
*Recorder of the General Land Office.*

Recorded vol. 6, pages 260 to 265, inclusive. Examined.

47 Endorsed: No. 16400. William Moyer placer patent. State of Colorado, Lake county, *ss:* Filed 1 o'clock p. m., Feb. 7, 1880, and recorded in book 22, page 490. Jos. H. Wells, recorder, per E. T. Wolverton, deputy. Pl't'ff's Ex. "A." 11–16–'85. C. W. R.

Plaintiff, by its counsel, next offered in evidence a certificate from the register of the land office, showing the date of the application for patent to the said William Moyer placer claim.

To the introduction of which the defendant, by its counsel, objected because it is immaterial, but the court overruled said objection, and the said certificate was marked Plaintiff's Exhibit "B," and is in words and figures following, to wit:

UNITED STATES LAND OFFICE,
LEADVILLE, COLO., *October 12th*, 1885.

I, S. J. Hanna, register of the United States land office at Leadville, Colorado, do hereby certify that application for patent for the William Moyer placer mining claim, survey No. 300, California mining district, Lake county, Colo., was duly filed in this office on

the 13th day of November, 1878, being application No. 214, and said claim was duly entered for patent on the 21st day of February, 1879, as entry No. 180; all of which appears by the records of this office.

(Signed) S. J. HANNA, *Register.*

Endorsed: William Moyer placer. Register's cert. Plaintiff's Exhibit "B." Nov. 16, '85. C. W., R.

48 Plaintiff, by its counsel, next offered in evidence a power of attorney from William Moyer to A. S. Weston, which was admitted without objection, and was marked Plaintiff's Exhibit "C," and is in words and figures following, to wit:

Know all men by these presents that I, William Moyer, of the county of Lake and State of Colorado, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, A. S. Weston, of the same place, my true and lawful attorney, for me and in my name, place, and stead and for my use and benefit to grant, bargain, sell, remise, release, convey, and quit-claim to whom and upon such terms as our said attorney may deem best all of my right, title, and interest, estate, claim, and demand, both in law and equity, as well in possession as in expectancy of, in or to that certain portion, claim, and mining right, title, or property and situated in the California mining district, county of Lake and State of Colorado, described as follows, to wit: All of that part or portion of the Wells and Moyer placer claim, being U. S. survey No. 281, for which the said Wells and Moyer have given bonds or agreements for deeds, and also the William Moyer placer claim, being U. S. survey No. 300; giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I myself might or could do if personally present, hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue of these presents.

In witness whereof I have hereunto set my hand and seal
48½ the 26th day of October, A. D. one thousand eight hundred and seventy-eight.

(Signed) WILLIAM MOYER. [SEAL.]

Signed, sealed, and delivered in the presence of—

——— ———.

STATE OF COLORADO, } ss:
*Lake County,* }

I, D. Houghton, a notary public in and for the county and State aforesaid, do certify that William Moyer, who is to me personally known to be the person whose name is subscribed to the foregoing power of attorney, appeared before me this day and acknowledged the execution thereof as his free and voluntary act for the uses and purposes therein set forth.

Witness my hand and notarial seal this 26th day of October, A. D. 1878.

[NOTARIAL SEAL.] (Signed) D. HOUGHTON,
*Notary Public.*

Endorsed: No. 2706. Power of attorney to sell mining property. Wm. Moyer to A. S. Weston. Dated 187–. Recorded at the request of —— April 29th, A. D. 1879, at 12 m., in book 16 of powers of attorney, page 308. Jos. H. Wells, recorder. Plaintiff's Exhibit "C." Nov. 16, '85. C. W. R.

49 The plaintiff, by its counsel, next offered in evidence a quit-claim deed from William Moyer to William H. Stevens and Levi Z. Leiter, which was admitted without objection and marked Plaintiff's Exhibit "D," and is in words and figures following, to wit:

This deed, made this 24th day of Feb'y, in the year of our Lord one thousand eight hundred and eighty, between Wm. Moyer, by A. S. Weston, his attorney-in-fact, of the county of Lake, and State of Colorado, of the first part, and William H. Stevens and Levi Z. Leiter, of the county of —— and State of Colorado, of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of five thousand dollars to the said party of the first part in hand paid by the said parties of the second part, the receipt whereof is hereby confessed and acknowledged, has remised, released, sold, conveyed, and quit-claimed, and by these presents does remise, sell, convey, and quit-claim, unto the said parties of the second part, their heirs and assigns, forever, all the right, title, interest, claim, and demand which the said party of the first part has in and to the following-described mining claim situate, lying, and being in the county of Lake and State of Colorado, to wit:

All of that portion or tract of land situate in California mining district, in said county and State, known as the William
50 Moyer placer claim, U. S. survey No. 300, and more particularly described in the U. S. patent for said premises No. 3712, dated January 30th, A. D. 1880, excepting and reserving from these presents the following-described part or portion of said premises, viz: Beginning at corner No. 1, same as corner No. 7 of survey No. 300, thence south 625.2 feet to corner No. 2; thence S. 73 degrees 41 minutes E. 724.7 feet to corner No. 3; thence N. 11 degrees W. 675.6 feet to corner No. 4; thence N. 73 degrees 41 minutes W. 590.6 feet to corner No. 1, the place of beginning, containing 9.05 acres, more or less, variation 15 degrees E:

To have and hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in anywise thereunto appertaining, and all the estate, right, title, interest, and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said parties of the second part, their heirs and assigns, forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) WILLIAM MOYER. [SEAL.]
By A. S. WESTON, [SEAL.]
*His Attorney-in-Fact.*

Signed, sealed, and delivered in presence of—

——— ———.

STATE OF COLORADO, } *ss:*
*Lake County,* }

I, P. J. Coston, a notary public in and for said county, in the
51 State aforesaid, do hereby certify that A. S. Weston, attorney-in-fact for the within-named William Moyer, personally known to me as the person whose name is subscribed to the annexed deed as such attorney-in-fact, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as the free and voluntary act of the said William Moyer for the uses and purposes therein set forth.

Given under my hand and notarial seal this 24th day of February, A. D. 1880.

[NOTARIAL SEAL.] (Signed) P. J. COSTON,
*Notary Public.*

Endorsed: No. 17361. Quit-claim deed. Wm. Moyer to Stevens and Leiter. State of Colorado, Lake county, *ss:* I hereby certify that this instrument was filed for record in my office at 11.30 o'clock a. m., Feb. 25, 1880, and is duly recorded in book 38, page No. 88. Jos. H. Wells, recorder. Plaintiff's Exhibit "D." Nov. 16, '85. C. W. R.

The plaintiff, by its counsel, next offered in evidence a deed from William H. Stevens and Levi Z. Leiter to the plaintiff, The Iron Silver Mining Company, which was admitted without objection and was marked Plaintiff's Exhibit "E," and is in words and figures following, to wit:

This indenture, made this sixth day of March, in the year of our Lord one thousand eight hundred and eighty, between William H. Stevens, of the city of Detroit, and Levi Z. Leiter, of the city of Chicago, Cook county, State of Illinois, parties of the first part, and The Iron Silver Mining Company, a corporation created by and existing under the laws of the State of New York, party of the second part, witnesseth:

52 That the said parties of the first part, for and in consideration of the sum of one dollar and of four hundred and ninety-nine thousand nine hundred and ninety-two shares of the full-paid capital stock of the said Iron Silver Mining Company of the par value of twenty dollars per share, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, and forever quit-claimed, and by these presents do grant, bargain, sell, remise, release, and forever quit-claim, unto the said party of the

second part, its successors and assigns, all their right, title, and interest in and to the following-described real estate and mining property situated in the California mining district, county of Lake and State of Colorado, and known as the Stevens and Leiter mining estate, and more particularly described as follows, viz:

First. That certain mining claim, lode, ledge, or mineral deposit situate, lying, and being in the State and district aforesaid, and known as the "Irin" lode, ledge, or mineral deposit, the same being designated as United States survey lot number two hundred and thirty-three (233), reference being thereto had for a more full and accurate description of the same.

Second. All that certain mining claim, lode, ledge, or mineral deposit situated, lying, and being in the State and district aforesaid, and known as the "Iron Hat" lode, ledge, or mineral deposit, the same being designated as United States survey lot number two hundred and seventy-seven (277), reference being thereto had for a more full and accurate description of the same.

53 Third. All that certain mining claim, lode, ledge, or mineral deposit situated, lying, and being in the State and district aforesaid, and known as "Bull's Eye" lode, ledge, or mineral deposit, the same being designated as United States survey lot number two hundred and thirty-two (232), reference being thereto had for a more full and accurate description of the same.

Fourth. All that certain mining claim, lode, ledge, or mineral deposit situate, lying, and being in the State and district aforesaid, and known as the "Lime" lode, ledge, or mineral deposit, the same being designated as United States survey lot number two hundred and sixteen (216), reference being thereto had for a more full and accurate description of the same.

Fifth. All that certain mining claim, lode, ledge, or mineral deposit situate, lying, and being in the State and district aforesaid, and known as the "Stone" lode, ledge, or mineral deposit, the same being designated as United States survey lot number two hundred and seventeen (217), reference being thereto had for a more full and accurate description of the same.

Sixth. All that certain mining claim, lode, ledge, or mineral deposit situate, lying, and being in the State and district aforesaid, and known as the "Dome" lode, ledge, or mineral deposit, the same being designated as United States survey lot number two hundred and thirty-six (236), reference being thereto had for a more full and accurate description of the same.

Seventh. All that certain mining claim, lode, ledge, or min-
54 eral deposit situate, lying, and being in the State and district aforesaid, and known as the "Rock" lode, ledge, or mineral deposit, the same being designated as United States survey lot number two hundred and eighteen (218), reference being thereto had for a more full and accurate description of the same.

Eighth. All that certain mining claim, ledge, lode, or mineral deposit situate, lying, and being in the State and district aforesaid, and known as the "Seventy-six" lode, ledge, or mineral deposit, the same being designated as United States survey lot number two hun-

dred and seventy-four (274), reference being thereto had for a more full and accurate description of the same.

Each of the above described and referred to lodes, ledges, and mineral deposits being by United States Government surveys fifteen hundred (1,500) feet in length by three hundred (300) feet in width, be the same more or less.

Also all their right, title, and interest in and to the following-named lodes, ledges, or mineral deposits situated in the State and district aforesaid, and designated and known by the following names, viz:

The "William Redick" lode, ledge, or mineral deposit.
The "Lingula" lode, ledge, or mineral deposit.
The "Porphyry" lode, ledge, or mineral deposit.
The "Grand View" lode, ledge, or mineral deposit.
The "Wells & Moyer" placer claims and mineral deposit.
The "William Moyer" placer claim and mineral deposit.
The "Stevens & Leiter" placer claim and mineral deposit.
The "Sawyer Contracts" lodes and placer claim.
The "Oro" lode claim.
The "Routt" lode claim.
55 The "Denver" lode claim.
The "Leadville" lode claim.
The "William Montgomery" and "Bank" claims.

The intent of this instrument being to convey to the said party of the second part, its successors and assigns, all the interest of the parties of the first part in and to all the mines, lodes, ledges, and claims above specified, designated, and referred to, the same being all of the interests of the said parties of the first part in and to each and every thereof, and in and to what is known as the Stevens and Leiter mining estate, situate in the State and district aforesaid, whether the said claims or properties or either of them be in patent entries, claims, or contracts.

Also all tools, machinery, stock ore on hand, and all other personal property connected with said mines or either of them or used in the working thereof and belonging to the said Stevens and Leiter, and to all money in banks at Leadville and Denver belonging to the mining estate conveyed hereby, not including, however, the interest of the parties of the first part to the town site of the city of Leadville, known as United States survey lot number two hundred and seventy-one (271), together with all the dips, spurs, and angles, and also all the metals, howsoever and in whatsoever manner and amount the same may be combined; all ores, gold and silver bearing quartz rock and earth thereon, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed, and also all and singular
56 the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and the rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, and to the said premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, its successors and assigns, forever.

And the parties of the first [part] hereby covenant and agree to make, or cause to be made, to the said party of the second part, its successors or assigns, such other or further conveyance or conveyances as the party of the second part, its successors or assigns, may deem necessary or proper to more perfectly vest or conform the right, title, or interest in or to any of the estate, real or personal, hereby conveyed or intended so to be, such further conveyance, however, to be made upon the request and at the expense of the party of the second part, its successors or assigns.

In witness whereof the parties of the first part have hereunto set their hands and seals the day and year first above written.

(Signed) WILLIAM H. STEVENS. [SEAL.]
LEVI Z. LEITER. [SEAL.]

Sealed and delivered in the presence of—
WILLIAM H. CLARKSON.
H. W. H. FITZGERALD.
D. F. VERDINAL.

STATE OF NEW YORK,
*City and County of New York,* } *ss:*

57 Be it remembered that on this 6th day of March, A. D. 1880, before me, William H. Clarkson, a commissioner of deeds of the State of Colorado in and for the State of New York, residing in the city of New York aforesaid, personally appeared William H. Stevens and Levi Z. Leiter, personally well known to me to be the same persons described in and who executed the foregoing instrument as parties thereto, who, severally, acknowledged to me that they signed, sealed, and executed the same freely and voluntarily for the uses and purposes therein mentioned, and that the same was their free and voluntary act and deed.

In witness whereof I have hereunto set my hand and affixed my official seal this 6th day of March, A. D. 1880.

[SEAL.] (Signed) WILLIAM H. CLARKSON,
*Commissioner for Colorado in New York,*
117 *Broadway, N. Y. City.*

Endorsed: William H. Stevens and Levi Z. Leiter to the Iron Silver Mining Company. Deed. Dated 6 March, 1880. State of Colorado, county of Lake, *ss:* Filed for record at 10.30 o'clock a. m., Mar. 18, 1880, and duly recorded in book 24, page 354. Jos. H. Wells, recorder; E. T. Wolverton, deputy. Plaintiff's Exhibit "E," Nov. 16, '85, C. W. R.

FRANCIS T. FREELAND, being called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. SYMES:

Q. Mr. Freeland, where do you reside?
A. In Leadville.
Q. What is your occupation?
A. Mining and mechanical engineer.
58 Q. How long have you been engaged in the practice of a mining engineer?
A. Since the fall of 1881.
Q. You were educated as a mining engineer, were you?
A. As a mining and mechanical engineer.
Q. What position are you now occupying in your profession?
A. I am superintendent of the Iron Silver Mining Company and the Nisi Prius Mining Company at Leadville.
Q. Have you been surveyor and mining engineer of that company in making the surveys?
A. Yes; previous to August of this year.
Q. Mr. Freeland, have you also made a map or plat of the Goodell and Gardiner lode claims, which are located within the William Moyer placer claim?
A. I have.
Q. Will you explain how you made that plat, and point out the boundaries of the William Moyer placer claim, and also the boundaries of the Goodell and Gardiner lode claims?
A. The plat shown here represents the William Moyer placer, the corners being designated by the numbers from one to ten, and is on a scale of a hundred feet to the inch. Within the boundaries of that placer are laid down the Goodell and Gardiner lode claims, the Goodell claim being designated by a broad green stripe and the Gardiner by a broad brown stripe. I have also laid down on this plat the course of Nugget gulch, which runs through the center of this claim, the California gulch also being represented, and I have also laid down certain ditches which have been used to carry water for working this placer and other purposes; also the location of the tunnel to which Mr. Reed referred; also the discovery shafts, so called, of the Goodell and Gardiner lode claims.
59 Q. Did you make that plat and mark those boundaries, or those lines which represent the boundaries of those claims, from field notes of actual surveys of the claims?
A. I did; and compared those surveys with the course and distances as laid down in the patent of the Moyer placer claim and the official survey of the Goodell and Gardiner claims in the land office.
Q. Does that plat show the ground included within the William Moyer placer patent and the ground included within the boundaries of the Goodell and Gardiner lode claims?
A. It does.

Plaintiff, by its counsel, here offers in evidence the location certificate of the Gardiner lode claim for the sole and only purpose of fixing the date of the pretended discovery and location of that lode claim, which was marked Plaintiff's Exhibit "F," and is in words and figures following, to wit:

Book L, page 137, Doc. 1008.

STATE OF COLORADO, } ss:
*County of* ——, }

Know all men by these presents that we, Maurice Hayes, John Hayes, R. E. Goodell, and George C. Gardiner, the undersigned, have, this tenth day of March, 1879, located and claimed, and by these presents do locate and claim, by right of discovery and location, in compliance with the mining acts of Congress approved May 10, 1872, and all subsequent acts, and with local customs, laws, and regulations, 1,500 linear feet, *and* horizontal measurement, on
60 the Gardiner lode, vein, ledge, or deposit along the vein thereof, with all its dips and variations as allowed by law, together with 150 feet on each side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges, or deposits and surface ground within the lines of said claim, 950 feet running northerly from center of discovery tunnel and 750 feet running southerly from center of discovery tunnel, said discovery tunnel being situate upon said lode, vein, ledge, or deposit and within the lines of said claim in California mining district, county of Lake and State of Colorado, described by metes and bounds as follows, to wit:

Beginning at corner No. 1, being same as cor. No. 4 of the Goodell lode, and running thence N. 11 degrees W. 750 feet to stake, being same as west center side stake of Goodell lode, 1,500 ft. to cor. No. 2, being same as cor. No. 3 of Goodell lode; thence S. 79 degrees W. 300 ft. to cor. No. 3; thence S. 11 degrees E. 750 ft. to stake over discovery tunnel & west center side stake of claim 1,500 ft. to cor. No. 4; thence N. 79 degrees E. 300 ft. to cor. No. one and place of beginning, variation 15 degrees E., courses given from the true meridian; said lode was located on the first day of February, A. D. 1879.

(Signed) MAURICE HAYES. [SEAL.]
JOHN HAYES. [SEAL.]
GEO. C. GARDINER. [SEAL.]
R. E. GOODELL. [SEAL.]

Attest: A. D. FOOTE.

Date of certificate, March 10th, A. D. 1879.

Endorsed: Recorded March 11th, A. D. 1879, at 4 o'clock p. m. Jos. H. Wells, recorder. C. P. Nicholson, deputy. Plaintiff's Exhibit "F." Nov. 16, '85. C. W. R.

61 Q. Mr. Freeland, you have examined the Goodell and Gardiner location certificates heretofore?

A. Yes, sir.

Q. And you have testified, I believe, that the boundaries of the Goodell and Gardiner locations, as fixed by your plat or map, correspond with the description and field-notes in the location certificate?

A. Yes, sir.

Q. You can just state the date of the Gardiner location certificate.

A. The date of the location of the Gardiner lode claim, as taken from the location certificate, is the first of February, 1879; the date of the certificate, March the tenth, 1879.

Cross-examination by Mr. THOMAS:

Q. How long have you been in the employ of the Iron Silver Mining Company?

A. With the break of a few months—about three months—since July, 1882.

Q. That time has enabled you to familiarize yourself quite extensively with the boundaries and conditions of the different claims, both lode and placer, of that company?

A. Yes, sir.

Q. The Wells and Moyer placer claim and the Moyer placer claim join together, do they not?

A. Yes, sir.

Q. This blue line here is identical with this blue line here; one is contiguous to the other?

A. Yes, sir; this corner here is identical with that corner, and this nitch fits over that line.

Q. Why didn't you put them all together?

A. I was not under the impression that both cases would be tried together, and it would be more convenient to show them on different plats.

62 Q. Now, Mr. Freeland, does not the upper boundary of the Moyer placer represent the boundary of a lode claim?

A. Yes, sir.

Q. Does not the lower boundary of the Moyer placer represent the boundary of a lode claim?

A. Not one claim; there are several different claims.

Q. The boundaries which we find on this side of the gulch also represent the boundaries of lode claims?

A. There is other placer on this end.

Q. Mr. Freeland, will you take this pointer and point out what is known as the Moyer shaft on the Moyer placer claim?

A. The shaft is near this short side line of the placer claim; is known as the Moyer shaft.

Q. Is that the shaft sunk by the Iron Silver Mining Company?

A. Yes, sir.

Q. To what depth was it sunk?

Objected to by plaintiff's counsel because immaterial and because it is not cross-examination.

The COURT: I suppose it is not pertinent to anything I heard offered in chief.

Plaintiff, by its counsel, offers in evidence the plat of the William Moyer placer claim, showing the locations of the Goodell and Gardiner lode claims, which have been testified about by the witness Freelend, which map was marked Plaintiff's Exhibit "G," and is as follows:

(Here follows diagram marked p. 63.)

64&65 The plaintiff here rested its case.

Mr. PATTERSON: If your honor please, I desire to bring a question before the court at this time with reference to the lode, and we move for a nonsuit in behalf of the defendant, and reason for the nonsuit is that there was a lode—the Gardiner lode—existing and located prior to the entry of the William Moyer placer. The purpose for which the location certificate was introduced was for the purpose of showing the date of the location of the Gardiner lode claim. The plaintiff's own testimony shows that said lode was located on the first day of February, 1879. They have shown the location of the lode; that it was located, and they have shown the date of the location; and in connection with that they have introduced a certificate from Mr. Hanna, the register, that shows the date of the application for the patent and the date of the entry, and it shows affirmatively that this placer claim was entered upon the 21st day of February, 1879, or the entry was made twenty-nine days after the location of the Gardiner lode claim, or, I should say, twenty-one days after the location of the Gardiner claim.

The plaintiffs having introduced that evidence, it seems to me that they are foreclosed, both by the act of Congress and by the recitals in the patent. We claim, if your honor please, that their own testimony shows, and it must be taken against them to the full legal effect of the evidence they have introduced, p. —, that at the date of the entry of the William Moyer placer there was not only lodes known to exist, but they were actually located twenty-one days before the entry of that ground for patent.

66 Mr. THOMAS: If the court please, there is another ground upon which we think we are entitled to judgment. The complaint in this case follows the description of the patent, and it claims an ouster as to those descriptions, and the deed that was introduced from William Moyer to Stevens and Leiter of the William Moyer placer makes an exception of quite a large portion of ground, and my understanding of the rule is that where the plaintiff claims in his complaint title to a certain piece of ground, which is designated by metes and bounds, and introduces testimony to show that he has no title to that amount of ground, that he cannot recover, and we ask for judgment upon that ground in this case.

The COURT: From the evidence as it now stands it seems that the location may have been before the date of entry, although after the date of application; whether that clause in the patent is valid or void I do not propose to consider further than may be necessary, or

that may be decided in saying that I shall follow the language of the patent in this instance. Proof of the existence of a lode there, and one known to the patentee, to the person taking the patent, is not always conclusive from the location certificate; there are plenty of location certificates made and filed in cases where no lode was ever found or no evidence of any. I don't think the plaintiff, in showing a location certificate, has made a case against himself, in which it may be said a lode was known to exist to the patentee at the date of the entry or at the date of the patent.

On that ground the motion to instruct the jury to find for
67 the defendants will be denied. They must introduce evidence of the existence of a lode.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

And thereupon the defendant, to maintain the issue herein on its behalf, gave in evidence as follows—that is to say, the following evidence was offered on behalf of d'f'd't and on behalf of pl'ff in case of Sullivan *vs.* the plaintiff herein, all which cases were submitted together.

The defendant, by its counsel, offered to read in its behalf & on behalf of said Sullivan, the deposition of George Leonhardy, which was taken by stipulation.

Mr. SYMES: We object to the reading of the deposition at this time, because the defendant has not yet shown that it has any lode claim in any way whatever, except that we have shown that the location certificate was filed at a certain time, to fix the date of the location.

The COURT: The defendant can put in evidence all he wishes as to the existence of a lode, and the knowledge of the patentee of it, with a view to make his record. If you can prove any other lodes, tending to prove this one—that is to say, the purpose would be incorrect in general, but we all understand very well the theory in respect to this ground is there is one lode going all through, so if he offers testimony to show there are other lodes around there it tends to prove the existence of this lode.

Mr. OWERS: Anything which is not a discovery and which they claim they certainly have no right to attempt to prove, and they have no rights if they have no discovery; they must first
68 prove a discovery before they can establish the existence of a vein.

The COURT: Well, Mr. Owers, the theory upon which they proceed is that you never got this lode—being known to you. Whether they made a valid location of it or not is another question, but if it was known to the patentee at the time of the entry, whether located or not, their position is, and they are going to maintain in the supreme court, if they can, that you never got title to it by means of your placer patent.

To which ruling and decision of the court, the plaintiff, by its counsel, then and there duly excepted.

And thereupon defendant's counsel read the deposition of GEORGE LEONHARDY, which is in words and figures following, to wit:

Redirect examination by Mr. THOMAS:

Q. Where do you reside?
A. I reside at Riverside, Chaffee county.
Q. How long have you lived in that section of the State?
A. About 23 years.
Q. State whether or not Chaffee county was originally a part of Lake county.
A. It was.
Q. How far is Riverside from the city of Leadville, in Lake county, about?
A. About 30 miles.
Q. Did you ever live in California gulch, in Lake county?
A. Yes, sir.
Q. When was that?
A. That was in 1863 and 1864.
Q. During your residence in Colorado what has been your occupation?
A. Mining and farming.
Q. About how much of that time have you given to mining?
A. I have been more or less engaged all the time in mining.
69 Q. What sort of mining?
A. Placer mining, principally, and part lode mining.
Q. What part of the country have you been engaged in in placer mining, and when?
A. I was engaged in placer mining in 1863 and 1864 in California gulch, and since then principally in Riverside, on the Arkansas river.
Q. Do you know where the location known as the Wells & Moyer placer claim is?
A. I do.
Q. How long have you been familiar with the premises now covered by that claim?
A. I have known them ever since 1863.
Q. At that time state what the character of the mining was for the most part in that vicinity?
A. Placer mining.
Q. State if you know of any lode locations or claims adjoining the William Moyer placer claim; and, if so, when you first knew of their existence.

Objected to by plaintiff as immaterial and irrelevant.

Mr. SYMES: The plaintiff objects to all testimony in the deposition of George Leonhardy on the ground that it is entirely immaterial whether or not there were any lode claims located in the vicinity, and because it is not competent or relevant to show the character of the land, whether lode, placer, or of any other character, after the patent has issued.

Which objections were overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. I remember of a great many holes having been sunk there between, well, 1860 up to 1870, or, say, '80, and in the other days we had the Pennsylvania, "520," and "1860," worked by Captain Breese; Pennsylvania was worked by Thompson.

70

Q. Do you know of a claim called the Ora La Plata?

A. Yes, sir.

Q. When did you first know of such a claim?

A. I knew of that claim, if I recollect right, in 1876.

Q. Where is that located with reference to the William Moyer placer claim?

Objected to by plaintiff as immaterial and irrelevant for the reasons last above given; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. It is part of it, I should think; is on the Wells & Moyer placer.

Q. Did you in 1876 or at any time make any examination of the undergound workings of the La Plata?

Objected to by plaintiff as immaterial and irrelevant and for the reasons above given; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. It was not underground, but I examined the dump.

Q. What evidences of vein matter did you find upon the dump?

Objected to by plaintiff as immaterial and irrelevant and for the reasons above given; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. I found carbonate of iron.

71

Q. You spoke a moment ago of the Pennsylvania; when did you first know of such a location?

Objected to by plaintiff as immaterial and irrelevant and for the reasons above given; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. It must have been about 1872, somewhere, if I recollect right.

Q. Where is that located with reference to the Wells & Moyer placer?

Objected to by plaintiff as immaterial and irrelevant and for the reasons above given; which objection was overruled by the court; to which ruling the plaintiff, by its counsel, then and there duly excepted.

A. That is on the outskirts—in fact, it ran into the Wells & Moyer placer—part of it—in the upper end.

Q. When you speak of the upper end, which end do you mean, with reference to the points of the compass?

A. The gulch lies about east and west; then it would be on the east side of the Wells & Moyer placer.

Q. Did you ever examine the underground workings of the Pennsylvania?

Objected to by plaintiff as immaterial and irrelevant, and for the reasons above given; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

72 A. I did; the first work they did on it. I should think it must have been about 15 or 20 or 30 feet down; that was in 1872.

Q. State whether it disclosed any vein, lode of rock in place, and if so, what kind of a one, and what its general direction was.

Objected to by plaintiff as immaterial and irrelevant, and for the reasons above given; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. I went in; they were in quartz first, and by sinking deeper they got into galena.

Q. State how this quartz and galena were situated in the earth as to being in place.

Objected to by plaintiff as immaterial and irrelevant and for the reasons above given; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. Well, I could not really say; it was in solid formation, but I really could not say which way it pitched; I knew at the time, but I have forgotten.

Q. Do you know of any mines adjoining the Wells & Moyer called the Rock and Dome mines?

A. Yes, sir.

Q. How long have you known of them?

A. I have known of them since 1868; at least I know of the outcroppings since then.

Q. When you speak of knowing the outcrop since then, what do you mean?

73 A. I was prospecting there and discovered the outcroppings.

Q. Outcroppings of what?

A. Iron carbonates.

Q. When did you first know of them as lode locations?

A. I knew of them in 1876.

Q. Did you ever examine any of the underground workings of the Rock and Dome claims?

Objected to by plaintiff as immaterial and irrelevant and for reasons above given; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. I was in —, I think it was in 1877—in the fall of 1877 I was there, and they had done a great deal of work there; I was to the entrance of the mines in 1877, and there was a great deal of mineral lying around in every direction there that they had wheeled out and was shipping—in fact, they had shipped mineral from there in 1876, but I had not then been to the workings.

Q. You have never been in the workings?

A. Not in 1876, but in 1877 I went in.

Q. Now, I will ask you to state what, if anything, is disclosed in the way of mineral, and, if anything, how it is situated and what its general dip is.

Objected to by plaintiff as immaterial and irrelevant and for reasons above given; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. In those days we were not conversant with that quality of mineral, and when discovered—that mineral there—it at-
74 tracted considerable attention, and we all would go there and examine, and we found it was a big body of carbonates—iron carbonates—being worked on it, and it seemed to run into the hill.

Q. State whether it ran into the hill in the direction of or away (from) what is now the Wells & Moyer placer.

Objected to by plaintiff as immaterial and irrelevant and for reasons above given; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. In the direction of the Wells & Moyer placer.

Q. At about what angle of inclination?

Objected to by plaintiff as immaterial and irrelevant and for reasons above given; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. Well, I really could not tell.

Q. Was the pitch of the mineral more or less perpendicular or more or less horizontal?

Objected to by plaintiff as immaterial and irrelevant and for reasons above given; which objection was overruled by the court; to which ruling the plaintiff, by its counsel, then and there duly excepted.

A. More or less horizontal.

Q. When you speak of iron carbonates state whether or not you speak of ores carrying silver, gold, or lead.

Objected to by plaintiff as immaterial and irrelevant and
75 for reasons above given; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. I speak of ores carrying lead, silver, and gold.

Q. Are these deposits of iron carbonates of which you speak in place?

Objected to by plaintiff as immaterial and irrelevant and for reasons above given; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. Yes, sir.

Q. State whether or not during the times, or any of them, that you have mentioned there was any knowledge among the people in that vicinity or neighborhood as to the existence or non-existence of any vein or deposit of mineral ore underneath the premises now known as the William Moyer placer claim.

Objected to by plaintiff as immaterial and irrelevant and for the reasons above given; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. There was.

Q. State what that knowledge was—that is, as to whether there was or was not.

A. There was knowledge that there was mineral. Wherever they sunk there they found mineral, you might say.

Q. What is meant by mineral in rock in place among miners?

A. Where you strike a body of mineral that don't seem to have been disturbed and is in solid formation.

76 Q. What is meant by placer deposits?

Objected to by plaintiff as immaterial and irrelevant, and the United States statutes (sec. 2329) defines what is placer deposits; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. Placer deposits is wash gravel containing gold.

Q. What proportion, if you know, of the William Moyer placer claim is what is known or might be termed among miners as placer ground?

Objected to for the reason that the character of the ground cannot be inquired into. It is an incompetent question for the reason that the patent itself is conclusive evidence of the character of the ground; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. There is a very small proportion—I should think from 5 to 7 per cent.

Q. Where is that 5 to 7 per cent. to be found—in what part of the claim?

A. That is in the gulch at the foot of the hill.

Q. I will ask you, Mr. Leonhardy, if you are acquainted with W. H. Stevens?

A. I am.

[Q.] How long have you been acquainted with Stevens?

A. I have known him since '76.

Q. Has your acquaintance with him been intimate or otherwise?

A. It has been intimate.

77 Q. Did you ever have any conversation with Stevens about the premises included in the William Moyer placer patent in the spring of '77?

Objected to by plaintiff as immaterial and irrelevant, and for the reasons above given; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. I have.

Q. Where was that conversation?

A. That was at my house in Riverside.

Q. State what that conversation was.

Objected to by plaintiff as immaterial and irrelevant and for the reasons above given; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. In the spring of '77 Mr. Stevens came to my house and he had brought out a great many men from Detroit to work for him in California gulch in that vicinity, and he stopped there over night, and while he was there he spoke very illy of this country; said the country wasn't worth anything; I finally told him that I thought that his actions belied his words; he wanted to know why. "Why," said I, "you are bringing out here three or four hundred men, paying their expenses out here, and I know you are sharp enough not to lay out money that way unless you are going to have some returns for it." He then didn't say anything more until after breakfast; he told his men to get ready and go into the road, and they went out. Some were in the house and some were in the

78 ambulance. He told them to hitch the horses in the ambulance and get ready, and he followed them out of doors, and he came back and shut the door, and he told me he had staid there to have a long talk with me, and he said, "You may think it queer the way I am acting. The country is good, the best mineral country I ever saw, but if I told the men so they would leave me as soon as they got up there, and go on their own hook." Then he told me he had been there since '76, and what the result was and what he had expended. He had sunk several locations—a great many; built houses and expended some thirty thousand dollars; now he had found an immense body of mineral underlying all that ground there; that he had shipped a great many tons; that they had netted

him so much—the figures I forget—but they had paid him a handsome profit; that he was going up there to secure the ground and begin very heavy operations shipping ore.

Q. State what he said, if anything, at the time about his intention of locating territory upon the dip of the veins he had discovered.

Objected to by plaintiff as immaterial, incompetent, and irrelevant, and for reasons above stated; which objection was overruled by the court; to which ruling, the plaintiff, by its counsel, then and there duly excepted.

A. Well, about, I should think, a week or two weeks afterwards—I don't know exactly—he got into trouble up there, and he concluded that the atmosphere was better down below at my house than it was up there; he came down; said they had treated him very badly up there—the miners; that they were afraid he was going to
79 gobble up the whole country; "but if I cannot do it in one way, I will do it in another." He said: "I have spent more money up there than any body else, and I am entitled to the ground."

Q. State what, if anything, he said, on either of these occasions, his object to be in taking up large areas of territory.

A. So as to secure the mineral there was on it.

Q. What kind of mineral?

Objected to by plaintiff as immaterial, incompetent, and irrelevant, and for reasons above stated; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. Carbonate mineral they were shipping there at that time.

Q. In place?

A. In place.

Cross-examination by Mr. OWERS:

1 X. Did Mr. Stevens ever say anything to you at this time you speak of about his having the top or apex of the vein?

A. He did not; we didn't know anything about apexes in those days.

2 X. Did he say anything about having an outcrop?

A. He simply told me he had prospected that country and had found a great deal of mineral there throughout—it was underlying the whole country.

3 X. Did he say anything about the outcrop of any vein?

A. No, sir; he did not.

4 X. Do you know the iron mine locations?

A. I do.

5 X. Don't they follow the course of that vein?

A. Do you mean the iron mine?

6 X. Do the iron mine locations follow the course of that
80 vein you speak of as known—as far as it is known—as far as it is traced?

A. I have not been in the iron mine.

7 X. I do not speak of the iron mines properly; I speak of the iron mine locations, the properties of the iron company?

A. I don't know whether they follow that or not, because I have never been inside of them.

8 X. What is the general strike of that vein?

A. The general strike of that vein, I suppose—up there on rock hill, do you mean?

9 X. On rock hill and on iron hill.

A. Well, it dips right into the hill there.

10 X. I asked for the strike?

A. I don't know what you mean by the strike.

11 X. The course of it?

A. The course of it, that is what I mean; it runs into the hill, say from the west to the east—towards the east.

12 X. You mean that it dips east into the hill?

A. That is what I mean; I may be wrong as to the course.

13 X. What do you mean by the course or strike of a vein?

A. I mean the way the mineral dips.

14 X. You do not recognize any difference between the course of strike and the dip of the vein?

A. I do; there are two classes of veins up there—we have the perpendicular vein, and we have the horizontal or blanket veins; we have two veins.

15 X. What is the difference between the course or strike and the dip?

A. One of them runs down into the ground at a very small angle, while the other runs more horizontally.

16 X. When you speak of the course or strike of the vein you mean the dip of the vein?

81 A. The dip.

Redirect examination by Mr. THOMAS:

1 Rd. Which kind of deposit is this that you speak of; is it a perpendicular or blanket or horizontal?

A. I call it a blanket.

Before signature I have corrected answers to my cross-examination as follows: To cross-questions 15 and 16 I desire to make answer that the strike of a vein is its course across the country, while its dip is the angle of its inclination downwards into the earth.

When questions were asked I understood Mr. Owers to want me to describe the difference between course and strike of blanket veins and fissure veins.

(Signed) GEO. LEONHARDY.

CHARLES C. BALDWIN, a witness called and sworn on the part of the defendant, testified as follows:

Direct examination by Mr. THOMAS:

Q. Mr. Baldwin, where do you reside?

A. In Leadville, Colorado.

Q. How long have you lived in Lake county?

A. Since the early part of 1877.
Q. How long have you lived in Colorado?
A. Since the early part of 1877.
Q. What is, and what has been during that time, your business?
A. Civil and mining engineer.
Q. Are you acquainted with Mr. William H. Stevens and Mr. Levi Z. Leiter?
A. Yes, sir.
Q. Do you know Thomas S. Wells or William Moyer, or both of them?
82 A. Yes, sir; both of them.
Q. How long have you been acquainted with them?
A. I became acquainted with William H. Stevens and Thomas S. Wells and William Moyer in 1877, Mr. Leiter in 1878.
Q. Were you at any time ever employed by Stevens and Leiter in your capacity as civil and mining engineer?
A. Yes, sir.
Q. When was that and how long did such employment last?
A. It began in the year, the early part, of 1877, and lasted for about a year and a half.
Q. Are you familiar with the two placer locations known as the Wells and Moyer and the Moyer locations?
A. Yes, sir.
Q. Who made the surveys of those claims?
A. I made the location survey of a portion of the Wells and Moyer, and Henry D. Bates made the location survey and patent survey for the William Moyer, placer.
Q. Was Henry D. Bates connected with you in business at all?
A. No, sir.
Q. State whether you assisted him in making the survey of the Moyer placer.
A. I did not.
Q. Mr. Baldwin, do you know where the Goodell and Gardiner claims are situated?
A. Yes, sir.
Q. Have you made any examination of the workings of those two claims?
A. Yes, sir; I did about thirty days ago.

By consent of counsel, direct examination continued by Mr. REED:

Q. Mr. Baldwin, did you ever examine the Mike tunnel, so called?
A. Yes, sir.
Q. What is the direction of it with reference to the Goodell
83 and Gardiner lodes?
A. It runs in an easterly direction, and cutting the Goodell and Gardiner locations at nearly right angle.

The plaintiff, by its counsel, here interposed an objection to all testimony regarding the Goodell and Gardiner claims as immaterial and irrelevant, and because those lode claims are shown by the record to have been located after the application was made for the

Moyer placer patent; which objection the court overruled, and to which ruling of the court in overruling said objection the plaintiff, by its counsel, then and there duly excepted.

Q. Mr. Baldwin, did you examine that tunnel with reference to whether there was a vein disclosed in it or not.

Objected to by plaintiff's counsel for the same reason; which objection was overruled by the court, and to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Q. State whether there was or not.

A. Yes, sir.

A. Yes, sir; there were several veins exposed in the course of the tunnel.

Q. Point out the tunnel there on the map and point out the location of the veins, as near as you can?

A. This represents the tunnel running in an easterly direction onto this point; being about its length, is about four hundred feet; at this point, about seventy-five feet in from the mouth, was disclosed a lode with porphyry walls, or, at least, a porphyry wall on the west side dipping to the east, and a vein showing decomposed porphyry with some pieces of iron at different points in the lode; the eastern wall was not as perfectly defined as the west wall; then
84 there were other lodes found further in the tunnel; I forget their exact distances from the mouth.

The COURT: When was that tunnel made?

Mr. REED: It was begun in January, 1877, and finished in the fall.

The COURT: Does he say he examined it at the time this survey was made?

Q. When did you examine it before, if you did?

A. I never was in the tunnel until about a month ago.

Q. The first you knew of these veins was a month ago?

A. Yes, sir.

Q. What did you see then as to there being disclosed there a defined vein in rock in place?

A. I considered it a well-defined vein in rock in place.

Q. You don't know when it was discovered?

A. No, sir.

Q. State, if you know and are acquainted with the hill, what its general characteristics are as to a vein compared with the hill where the Wells and Moyer placer is as to the contract.

A. Well, the contract exists under portions; it has been developed under portions of this hill and presents the same features as the Wells and Moyer placer.

Q. The same kind of vein?

A. Yes, sir.

Q. The same dip?

A. Nearly the same.

Q. What was the general understanding, if there was one at the time, about there being a vein under that Moyer placer?

A. It was supposed to exist there.

Q. Do you know the Mike and Starr lodes adjacent to the William Moyer placer on the map?

A. Yes, sir.

Q. Do you know of the time of the discovery of that vein?

85 Objected to by plaintiff's counsel as immaterial and irrelevant and because it is not shown that they are within the Moyer placer; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. I do not, sir.

Q. Did you ever examine the shaft?

A. No, sir.

Q. When did you first see it?

A. First see the Mike and Starr?

Q. Yes, sir.

A. I first knew of the existence of lode claims of the Mike and Starr, I think, in 1878 or 1879.

Q. How long was that after you went to the camp?

A. A couple of years—about two years, I guess.

Q. Did you survey there?

A. No, sir.

Q. Have you ever examined the vein or the shaft or any of the workings in it?

A. No, sir; not of the Mike and Starr.

Cross-examination by Mr. SYMES:

Q. Was there not quite extensive placer mining carried on for some time in Nugget gulch within the William Moyer placer, as it is called, through this blue line, which represents the bottom of Nugget gulch, connected with California gulch at this point—wasn't mining carried on there?

A. I believe not.

Q. Do you not know about that ditch put in by Berry and others to lead water out of California gulch way above the Wells and Moyer placer for the purpose of using it to mine in Nugget gulch—placer mining?

A. No, sir.

86 Q. Is there not a ditch with water in it every season that covers the whole of the William Moyer placer claim?

A. There is a ditch at the north end of the William Moyer placer running from the Evans gulch that leads to the iron mine.

Q. And isn't the water that is carried in that ditch so high that it will take it to any portion of the William Moyer placer claim for the purpose of mining?

A. I think it will on the north portion.

Q. You don't know anything about that old ditch used years ago?

A. I think that was the old ditch which is in California gulch.
Q. A branch of it?
A. Yes, sir.
Q. Are you familiar with the Mike and Starr mines?
A. No, sir.
Q. You haven't been in them?
A. I haven't been in them.
Q. You don't know anything about whether the workings extending east from the east boundary of the William Moyer are upon a vein dipping east?
A. Not from my own knowledge; no, sir.
Q. You don't know anything about that cross fissure or break that cuts off the contact vein at or near the Lime?
A. No, sir.
Q. You don't know anything, then, about the working that has extended to the west under the so-called Goodell claim or William Moyer placer upon the cross fissure or vein which they claim to follow by reason of having the apex of the cross fissure or vein within the Mike and Starr?
A. No, sir; I never was on the ground of the Mike and Starr; I don't know anything about the underground working or formation personally.

87 MICHAEL NORRIS, a witness called and sworn on the part of the defendant, testified as follows:

Direct examination by Mr. REED:

Q. Mr. Norris, do you know the Mike lode?
A. Yes, sir.
Q. How long have you known it?

Plaintiff's counsel object to all evidence concerning the Mike and Starr claims for the reason that it has not been shown that they are within the William Moyer placer; which objection was overruled by the court. To which ruling the plaintiff, by its counsel, then and there duly excepted.

A. Since 1867.
Q. Do you know who discovered it?
A. Yes, sir.
Q. Who?
A. Myself.
Q. In 1867?
A. Yes, sir.
Q. Do you know the Goodell and Gardiner lodes?
A. Well, I am not very well acquainted with them.
Q. Do you know the tunnel called the Mike tunnel?
A. Yes, sir.
Q. Do you know of any discoveries of lodes in that tunnel?
A. Yes, sir; three, I guess.
Q. Can you indicate on the map about where they are; have you looked at that map that is standing up there?

A. Yes, sir.

Q. Just take the pointer, please, and point out where those lodes are and describe them.

A. The first one, I think, is in here.

Q. Describe that place.

A. I think that is the biggest one. The west wall there has some iron.

Q. What is the character of the filling of the vein, if there
88 is any?

A. Decomposed porphyry, manganese, iron.

Q. Do you know whether it ever carried any mineral or not, of your own knowledge?

A. Not to my knowledge.

Q. You never worked in it?

A. No, sir.

Q. About how wide do you say it was?

A. I should say it was between three and four feet wide.

Q. Is it in solid rock or in wash?

A. Solid rock.

Q. When did you see it first?

A. About three or four weeks ago.

Q. Now, the other veins in there?

A. Well, the others are smaller; they are further to the east.

Q. Look at the map down below there—that sectional map of the tunnel; did you examine that tunnel running in there, showing the surface of the ground; do you know anything about that; have you examined that?

A. No, sir; I have not.

Q. How far in is the second vein from the first one?

A. Well, I couldn't exactly say.

Q. Well, about how far?

A. About seventy or eighty feet.

Q. How is that with reference to being located or found in solid rock; what are the walls of it?

A. The walls are porphyry.

Q. It is a vein, then, in porphyry?

A. Yes, sir.

Q. What is found in the vein that indicates that it is a vein—what kind of mineral?

A. Decomposed porphyry and soft material; some iron.

Q. You never examined that with reference to panning it?

A. No, sir.

Q. Do you know William Moyer, the patentee of the Moyer placer?

A. Yes, sir.

89 Q. How long ago did you know him?

A. I have known him since 1867.

Q. Did you have any conversation with him concerning his knowledge of the lode under that placer?

The plaintiff, by its counsel, objects to any conversation had with the applicant for the patent, because it is immaterial and irrelevant; which objection was overruled by the court, and to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Q. As to his knowledge of a lode being under that placer at the time he patented it or before?

A. Well, yes.

Q. What did he say?

A. Well, he told me he was going to get a patent on it for Mr. Stevens—I mean a placer patent.

Q. Well, did you have any talk with him about it?

A. Yes.

Q. State what conversation you had with him.

A. I had a claim around there myself, you know, and I was talking to him about it.

Q. A placer claim or lode claim?

A. A lode claim I had.

Q. What was it called?

A. The Thomas Francis Meagher it was called.

Q. What conversation did you have with him about that?

A. Well, he told me the placer would only go down to the bedrock, and it wouldn't interfere with me at all.

Q. Did you adverse him then?

A. No, sir.

Q. Why didn't you adverse him?

A. Because I thought it would be no use.

Q. Was it on account of that statement that you didn't adverse him?

A. Yes, sir.

Q. When was this?

A. 1878.

Q. What other statement, if any, did Moyer make about
90 Stevens' connection with it besides that he was getting it for Stevens.

A. He said Stevens was afraid that the miners would adverse him, and he wanted Moyer to get it.

Q. To get a patent for him?

A. Yes, sir.

Q. Who was to pay for it if it was obtained?

A. I think he told me Stevens was going to pay for it; it wouldn't cost him nothing.

Q. Has there ever been any gulch mining done in Nugget gulch, below the Goodell and Gardiner there?

A. Not to my knowledge.

Q. And you have been there since when?

A. Since from 1867.

Q. How does that Goodell and Gardiner lie with reference to the gulch; is it on the mountain or in the gulch?

A. It is out of the gulch—east of the gulch.

Q. Upon the side hill?

A. East; yes, sir; a flat.

Q. What I want to get at is—I want you to tell the jury whether those mines are above the gulch or on a level with the gulch?

A. It lies east of the gulch—of Nugget gulch.

Q. But is it in the gulch or up higher than the gulch?

A. It is up higher than the gulch.

Q. How much of a gulch is that?

A. It is very narrow.

Q. A very small gulch?

A. Yes, sir; a little ravine.

Q. It runs into what gulch?

A. Into California gulch.

Cross-examination by Mr. SYMES:

Q. You had located the Thomas Moyer placer?

A. Yes, sir.

Q. Have you made any discovery of any vein or lode?

A. There is a very small vein in it.

Q. What kind of a vein?

A. It is iron, sir.

91 Q. A streak of iron in the porphyry joints; is that it?

A. It lay on what we call bed-rock.

Q. What do you call bed-rock in that part of the hill?

A. Anything that is under the gravel, a solid formation.

Q. Is it what the miners call there a sort of a cement under the gravel?

A. Oh, no.

Q. How deep was it, Mr. Norris, about?

A. Thirty feet.

Q. In what direction did this vein dip?

A. It dipped south, outside of the gulch.

Q. It was an entirely separate vein from this contract vein there is so much talk about, where the ore is found in that vicinity?

A. Well, there was some contact there too.

Q. What do you call a contact?

A. Well, decomposed stuff, where iron comes in contact with mineral.

Q. I am referring to a contact between two different kinds of rock—for instance, the contact you found along that vein when you got down deep enough, between the line and porphyry?

A. Decomposed stuff; it is supposed to be porphyry or iron.

Q. Of what kind of rock were the walls of this vein composed?

A. They are composed of granite—porphyry and granite.

Q. Who found granite there; did you?

A. It was decomposed granite.

Q. You call anything that has a red iron stain a contact?

A. Oh, no.

Q. Why do you call this a contact?

A. Because it has a material in it.

Q. What kind of a material?

A. It was iron.

Q. Do you say that it was decomposed granite stained with iron, or decomposed porphyry stained with iron?

92 A. It was decomposed porphyry.

Q. I understood you to say you found some granite there decomposed?

A. What we call decomposed porphyry.

Q. It is the same thing to you, is it?

A. Yes, sir.

Q. What did you say the walls of these veins are composed of?

A. It was composed of porphyry and granite.

Q. Mixed together?

A. Yes, sir.

Q. About what porportion of porphyry and what porportion of granite?

A. Well, I don't know; we call it all granite and porphyry mixed up.

Q. About half and half?

A. Well, yes, about that?

Q. At what depth from the surface did you find this decomposed porphyry and granite vein and walls?

A. About thirty feet.

Q. You struck it near the bottom of your shaft?

A. Yes, sir.

Q. What did you call this shaft?

A. Called it the Thomas Francis Meagher.

Q. Discovery shaft?

A. Yes, sir.

Q. When did you sink that shaft?

A. In 1875.

Q. Did you record the location?

A. Yes, sir.

Q. Well, it conflicts with the Gardiner and Goodell claims, does it?

A. Oh, no, sir.

Q. On different ground?

A. Yes, sir.

Q. Point out where it was on that map?

A. On the south side of California gulch.

Q. Well, then, as a matter of fact, this claim you have been testifying about is not within the William Moyer placer at all?

A. Yes, sir.

Q. Not if it is on the south side of California gulch?

A. I said the Wells and Moyer placer.

93 Q. It is not in the William Moyer placer?

A. No, sir; it is across the gulch.

Q. It is on the south side of the gulch, in the Wells and Moyer placer?

A. Yes, sir.

Q. Then the conversation you had with William Moyer wasn't about this placer at all?

A. Yes; about that very one.

Q. Then the conversation you had with William Moyer was not about the placer your claim was located in?

A. Yes, sir.

Q. Well, which was it; the William Moyer or the Wells and Moyer?

A. It is the Wells and Moyer, the south side of California gulch.

Q. Then you wish to be understood here as having testified only about the Wells and Moyer, and not about the William Moyer placer?

A. Yes, sir; that is all I was asked, wasn't it?

Q. No; you were asked about the other; there is a mistake somewhere; I don't want your testimony to appear that way, that is all.

A. That is the way I understood it.

Q. The Thomas Francis Meagher lode; where do you understand that claim to be?

A. On the south side of California gulch.

Q. In the Wells and Moyer placer?

A. Yes, sir.

Mr. SYMES: We move to strike out all the testimony of this witness, because I understood no further testimony could be given that was applicable to the Wells and Moyer.

The COURT: Were these applications carried on at the same time for these patents?

Mr. SYMES: There is some months difference, if it please the court; one was made in 1878 and the other in 1879, six months difference.

94 The COURT: Is it understood this testimony relates only to the Wells and Moyer placer?

Mr. THOMAS: Our understanding is, while the location of this claim, as we find, was on the Wells and Moyer, the conversation had reference to the placer claims, that Moyer was interested in for Mr. Stevens.

The COURT: Find out when this conversation was.

By Mr. REED:

Q. When was that conversation, Mr. Norris?

A. With Moyer?

Q. Yes, sir.

A. In 1878.

Q. Was it at the time he was making application for the placer claims there?

A. Yes, sir; for this Wells and Moyer, because I had this claim there, and was talking with him about it.

Q. Now, had it reference to the other placer—the William Moyer placer?

A. No; this didn't.

Q. This conversation?

A. Yes.

Q. Now, did you have any conversation concerning the William Moyer placer?

A. No, sir; of course I had this claim here——
Q. Is it the same Moyer that was of Wells and Moyer?
A. Yes, sir.
Q. Did you know about the application for the Moyer placer made after the application for the Wells and Moyer?
A. No.
Q. You never had any talk with him about that?
A. No, sir.

The COURT: Very well, that part of it will be excluded. The other part as to the Mike and Starr discovery is pertinent to this issue.

95 To the latter portion of the ruling of the court the plaintiff, by its counsel, then and there duly excepted.

By Mr. SYMES:

Q. You have lived up in that country since 1867?
A. Between Oro and Leadville.
Q. Did you know of any lode being discovered or located or existing within the William Moyer placer before November, 1878?
A. Yes, sir.
Q. The William Moyer now I am confining it to.
A. Oh, no; I thought you meant the Wells and Moyer.
Q. You say you knew nothing about the tunnel or anything in it up to a few months ago?
A. Only what I heard of it.
Q. But you never were in it?
A. No; I never was.

JOHN HAYES, a witness called and sworn on the part of the defendant, testified as follows:

Direct examination by Mr. REED:

Q. Mr. Hayes, where do you reside?
A. In Leadville, sir.
Q. How long have you resided there?
A. I resided there about ten years.
Q. Do you know the Moyer placer?
A. Yes, sir.
Q. Do you know the Mike lode?
A. Yes, sir.
Q. Did you ever work on it?

Plaintiff's counsel object to all testimony concerning the Mike and Starr lodes as immaterial and irrelevant, and because they are not shown to be discovered or located before the application for patent for the William Moyer placer, and not shown to be within the William Moyer placer; which objection was overruled by the court; to which ruling of the court in overruling said objec-
96 tion the plaintiff, by its counsel, then and there duly excepted.

A. Yes, sir; worked on it.
Q. How much and when?
A. I have worked on it since July, 1874.
Q. Was there a lode or vein discovered there?
A. Yes, sir.
Q. How deep did you work it?
A. Well, in the Mike and Starr I worked until we went 550 feet.
Q. Do you know the Mike tunnel?
A. Yes, sir.
Q. How long have you known that? Who run that tunnel?
A. I have known it —; I started it in a good snow-storm in 1877.
Q. And how far did you run it?
A. I run it four hundred feet—I and my partners.

Plaintiff's counsel object to all testimony concerning the Mike tunnel as immaterial and irrelevant, because the patent of the plaintiff is conclusive against the world on that subject; which objection was overruled by the court; to which ruling of the court in overruling said objection the plaintiff, by its counsel, then and there duly excepted.

Q. Did you discover in that Mike tunnel any veins?

Objected to by plaintiff's counsel for the same reasons last given; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. I did discover a vein in that Mike tunnel; I struck the pick into it myself.
Q. When?
A. We discovered it about the 15th or 16th of February, 1877.
97 Q. How far from the mouth of the tunnel was that—about how far?
A. Oh, about seventy-five feet.
Q. Could you point out there on the map where it is?
A. Yes; that is about the point.
Q. Now, how much of a vein was that—describe it?
A. Well, it was about eighteen inches wide.
Q. Describe the vein as to the walls and sides of it, and what was in it.
A. Well, it was two porphyry walls *was* with the vein; it was decomposed part and a clay and vein matter, and I don't know if I could describe the vein better than that much. I haven't found out the vein matter myself, and have got several colors of gold in it, and my brother was the territorial assayer of Colorado at that time—he is dead now—and he had it assayed several times, and he got from a trace — to three-quarters of an ounce of gold in it.
Q. When was that? Who panned it?
A. That was in 1877; we started that tunnel the thirteenth day of January, 1877, and that year, and we worked in it right along, day and night, until the 24th of April, 1877.

Q. Now, did you discover any other vein?
A. Yes, sir.
Q. Where was that?
A. Well, we discovered a vein somewheres in about here—about two hundred feet from the mouth of the tunnel.
Q. Look at this other map and see if you can point it out there—the map below the one you have been using—that sectional map?
A. I don't know; I haven't seen that map before; I believe I looked at it once and that was all, and I didn't take any particular notice of it.
98 Q. Now, state the next vein that you discovered; you have mentioned two now. Did you ever discover any other?
A. Yes, sir; we discovered—there is four veins there.
Q. Now, what is the vein nearest the end of the tunnel?
A. Well, that one, that is a little over two hundred feet from the mouth of it, is nearest to the end of the tunnel.
Q. Now, what kind of a vein is that?
A. It is similar to the first one; well, the first one is more decomposed—the porphyry—the walls of it; this last one we have got is what we call block porphyry, more solid porphyry.
Q. State whether it is well defined and whether the walls enclosing it are in position.
A. Yes, sir; it is well defined and has two regular walls.
Q. That you discovered in running the tunnel?
A. That is what I discovered in running the tunnel.
Q. Now, Mr. Hayes, did you have anything to do with the staking of the Goodell and Gardiner lodes?
A. Yes, sir; I helped Charles Milburn to survey it.
Q. And did you mark the boundaries in any way?
A. Yes, sir; I helped him to drive down the stakes.
Q. How many stakes did you put down?
A. We put down six.
Q. At each claim?
A. Yes, sir.
Q. Did you file the location certificate?
A. I believe not at that time.
Q. Did you afterwards?
A. Afterwards.

The COURT: When was this staking done? Find out about that.

Q. When was this staking—what year did you do this staking?
99 A. Oh, it must have been in 1879, I think.
Q. It was before the date of the certificates?
A. Yes, sir.
Q. Are those the relocation certificates of the claims (paper shown witness)?
A. Yes, sir; and more, that is my name and my writing.
Q. You staked it, you said, before you filed these location certificates?
A. Yes, sir.

The COURT: How far had he driven the tunnel in 1877?

Mr. REED: He drove it entirely.

WITNESS: On the 24th. We done the assessment ever since the 24th of April, 1877; we stopped working for that year; we worked on it right along from the 18th of January to the 24th of April.

The COURT: How far had you gone in about the 24th of April?

A. About four hundred feet, Judge.

Q. The tunnel was four hundred feet long when you quit?

A. We done assessment work on it since, that made it a little longer, I think.

The COURT: But you had driven it four hundred feet in 1877?

A. Yes, sir; in 1877.

Cross-examination by Mr. SYMES:

Q. Was it an open cut or a tunnel?

A. A tunnel; part of it was an open cut before we got a roof on it, Judge.

Q. How much of it was an open cut and how much a tunnel?

A. Well, there was there, maybe, eight or ten feet of an open cut.

Q. Not more?

A. No, not more; we put sets of timber in and covered it—the mouth of it—where we started from in the open cut.

100 Q. You say you never staked or attempted to locate any mining claim there until 1879?

A. No we didn't, for very good reasons, when we didn't have money in 1877 to locate the claims.

Q. You didn't?

A. No; not in 1877.

Q. You worked there from January to April, 1877?

A. Yes, sir.

Q. What did you live on during that time?

A. Mr. Tabor was a good friend of mine; I paid him twelve hundred and fifty dollars of a grocery bill when I wound up with him.

Q. State how much money it would have cost to have located the claim.

Objected to by defendant's counsel.

The COURT: Such a question as this is absurd. Any argument you wish to make to the jury you can make.

To which ruling of the court, the plaintiff, by its counsel, then and there duly excepted, for the reason that it is notorious that the location of a claim would have cost but two dollars, and had witness at that time considered the claim worth locating he would have expended that sum to have done it.

Q. You didn't allow anybody in that tunnel, did you, during the time you worked there?

Hayes.



A. Yes, sir; I would allow every person to go in there; we allowed Mr. Reeves, and I wish he was here; we allowed him to see it; he was in that tunnel.

Q. Why do you wish he was here?

A. He was in that vein.

Q. You saw it?

A. Yes, sir.

Q. And you are satisfied about it?

A. Yes, sir.

Q. Will you tell us what kind of a vein it was?

101 A. It was a vein existing in the porphyry.

Q. Did it have porphyry walls?

A. Yes, sir.

Q. And it was a decomposed matter between porphyry?

A. It was decomposed quartz and talc; well, the vein—I am not a mineralogist, I can't just explain to you—it was a vein.

Q. I want you to explain it as a miner. Tell us whether or not there were placer mines near there before this?

A. Before, yes, sir.

Q. And gold dust had been taken out very near to where you sunk this shaft and commenced this tunnel?

A. Yes, sir.

Q. And is it not a fact that wherever there is placer ground and placer gold found as there was where you found this vein, that in any loose seam or crevice, or even cracks between the joints of the porphyry rock below, you would find decomposed matter which would carry gold in greater or less extent?

A. Well, surely the matter didn't go from the gulch on up the hill.

Q. It didn't?

A. No, I don't think it did.

Q. But didn't it leach down with the rain and frost into the rock below?

A. No; I can't answer where it come from.

Q. Well, was this anything more than a little seam in the porphyry into which there had leached from the rain, snow, and frost decomposed matter carrying some of that gold that is found in the gound above?

A. It was a vein; I claim there is——

Q. Of that kind?

A. At that time, yes, sir, and now.

Q. I say, of that kind?

A. Oh, of that kind, yes, sir.

Q. It is not any part or portion of that celebrated contact vein that carries so much ore in that country and is found about five hundred feet, probably, according to the theory of the wit-

102 nesses, underneath your tunnel?

A. Judge, I couldn't tell you that.

Q. Whether it is a part of that vein or not?

A. Whether it is a part of that vein or not.

A. I want your opinion as a miner?

A. My opinion as a miner is it is a leader or feeder leading to that main body; yes, sir.

Q. Starting at the surface and leading down to that main body?

A. Yes, sir; in my opinion as a practical miner.

Q. Who was interested with you in running this tunnel?

A. My brother and Tom Starr and a party called Morris Lynch.

Q. Did you show this vein to any of your friends---that you struck in that tunnel?

A. Any of my friends?

Q. Yes, sir.

A. I don't know as there is a persons here now that lived over at Oro at that time, except Mike Norris. I don't know that I showed it to him, but I told him I struck a vein there.

Q. Did you at that time tell any one of your friends in talking about that tunnel that you found a vein that you thought was of any value and worth locating upon?

A. I disremember whether I told a person anything about that or not.

Q. Did you have an opinion at that time that you had found any vein or deposit that was worth locating or claiming?

A. Yes, sir. I did have an opinion that it was worth locating.

Q. You did?

A. Yes, sir.

Q. Did you think you could mine upon that vein and
103 make anything taking out ore?

A. If I could afford for to sink it at that time; I think it would improve as I went in depth. No, I couldn't mine from the first where we struck; it wouldn't pay where we struck it.

Q. Why did you not stop in that tunnel where you struck that vein and sink a shaft on it, and not go upon the hill until you found a vein worth sinking upon?

A. Our object was to strike the vein that we located our surface upon—that is, from this point to where we sunk a shaft.

Q. That was the object for which you run that tunnel?

A. That was the object; we were supposed to have the Mike vein we struck in the tunnel.

Q. You run the tunnel, then, for the object of striking that Mike vein on the opposite side of the gulch?

A. It is on the same side of the gulch.

Q. But further east?

A. Yes, sir.

Q. But you incidentally, in running your tunnel, came on this vein you struck?

A. Yes.

Q. You didn't think it was of value sufficient to justify your stopping and sinking and developing it, but you went on with your tunnel four hundred feet in the hill to strike the other vein you knew of?

A. Yes; we went through this vein, and there was pay in the vein we were running for, the old Mike vein; we had time enough to

Hayes.



come back and develop it afterwards; we didn't stop right there; we done a hundred dollars' worth of work since 1877 till now.

Q. You had plenty of time, but you never developed it?

A. We have done assessment work on it since; developed it some.

104 (Objected to by defendant's counsel because it is immaterial as to what he did or did not. If he unclosed a vein the question is, Did the vein exist there at that time.)

Q. The Mike and Starr location or vein is not on the William Moyer placer?

A. No, sir; not as I understand it; the Mike and Starr—it is a wonder they didn't take that from us, too—Billy Stevens—we ought to give that Mike and Starr to Billy Stevens, along with the balance.

Q. If you have anything more to say about Mr. Stevens say it, and I will wait until you get through.

A. All right; I am waiting here, Judge Symes.

Q. Mr. Hayes, do you know the discovery shafts of the Goodell and Gardiner lode claims—the locations on which those claims were made?

A. Yes, sir.

Q. Have you been in them?

A. Yes, sir.

Q. Is there any discovery of any vein or lode or valuable mineral deposits within them?

A. Not in them discovery shafts; no, sir; if that is what you want to get at.

Q. That is only one of the things we want to get at, Mr. Hayes. Mr. Hayes, how deep are they?

A. They are ten feet at least.

Q. Would you say they were eleven or twelve feet, or about ten?

A. About eleven or twelve.

Q. There are no veins developed within them?

A. No, sir.

Q. Do you know when they were sunk or excavated?

A. They were sunk some time in 1878 or 1879; they were dug for an improvement on the property.

Q. Was it not in 1879?

A. It may be in 1879; I haven't got the date of that; we have done assessment work, sunk them two shafts on it; thought

105 the lode existed where we cut in the tunnel; we sunk where we thought the lode existed from the surface for 1879, for that assessment that year, I think; the other assessments ever since has been done in the tunnel.

Q. Then you are now confident that those discovery shafts were not sunk until 1879?

A. Well, I don't think they were sunk; I ain't confident of it; I can't be confident of that; I think it is 1879 they were sunk.

FRED. G. BULKLEY, a witness called and sworn on the part of the defendant, testified as follows:

Direct examination by Mr. REED:

Q. Mr. Bulkley, do you know the Goodell and Gardiner lodes?
A. Yes, sir.
Q. Did you make those maps that are put up there?
A. I made the one on paper, and also this one on tracing paper.
Q. The one on paper, does that correctly represent the location of those claims?
A. It does; yes, sir.
Q. Did you locate the tunnel thereon?
A. I did.
Q. Did you locate those veins—are they indicated there in any way?
A. This sectional drawing is also correct; yes, sir—from measurement and survey.
Q. Describe them throughout now, what they represent—both of them.

Objected to by plaintiff's counsel, because immaterial and irrelevant—the character of the formation, veins, or workings being irrelevant after patent; which objection was overruled by the
106 court; to which ruling the plaintiff, by its counsel, then and there duly excepted.

A. The upper portion of the map, which is made on white paper, represents a ground plan of the Starr, Mike, Goodell, and Gardiner lode claims, owned by the Mike and Starr Gold and Silver Mining Company, outlined in blue; also the William Moyer placer, outlined in pink, and owned by the Iron Silver Mining Company. It also shows the position and extent of the Mike and Starr tunnel—the tunnel which Mr. Hayes referred to; it also shows the position of various shafts upon the Mike claim; two shafts and some drifts and levels run from those shafts at a depth of from four to five hundred feet; the direction of north is indicated by this arrow-head; commencing near the bottom of the map or near the west line of the William Moyer placer, the ground rises gradually in a hill towards the east, so the upper portion of the map or the east side line of the Mike and Starr will be about 150 feet above a ravine running along very near the west line of the William Moyer placer; the claims shown thereon are correctly represented from surveys of my own, except the drifts and levels run upon the Mike lode and extending on to the Goodell lode; those are partly at present filled with water, and are copied from the working maps, which I believe to be correct. The Mike and Starr tunnel, as I say, is platted on this ground plan from my own survey. The total length from the point where the tunnel enters the ground to the breast is 388 feet, but before the tunnel enters the ground there is an open cut running into the slope of the hill about twelve or fifteen feet long from the mouth into the hill; the south-
107 easterly extremity or the southwesterly extremity, at which

I am pointing, is the entrance, and the tunnel runs into the hill in a northeastly direction, about north fifteen degrees east. The drawing upon the bottom of the paper is on a scale of ten feet to the inch, while the ground plan is on a scale of fifty feet to the inch. The drawing on the bottom of the paper is meant to represent what would be shown were the earth cut vertically down through the center line of that tunnel and exposed to view; the entrance of the tunnel is shown upon the right and the course and size of the tunnel is shown by a dark shading here. As one enters the tunnel, passing from the entrance toward the further extremity or breast, depth is gradually gained under the mountain, the slope of the hill being fourteen degrees forty minutes, or at the angle represented by the line which indicates the surface of the hill on the sheet. The first material which the tunnel encounters as it passes into the hill is a loose wash and gravel that extends for a distance of about twenty-five feet to thirty feet, and the next material encountered is white rock, or rather rock, the surface of which has about the same slope as the surface of the hill; the rock that is first encountered is porphyry and it is rather shattered and somewhat soft, and as depth is gained it gains a hardness until, [at] the depth of 78 feet, it is found to be hard and in place, or, in fact, before reaching that point, but unquestionably so at the point 78 feet from the mouth of the tunnel. At that point, with porphyry on either side of it—that is towards the east and
108 towards the west a crevice dips into the hill at an angle of sixty degrees thirty minutes. The crevice is from twelve to eighteen inches wide. The wall upon the westerly side is smooth—solid porphyry in place. I have made a small sectional drawing here on a scale of two feet to the inch, enlarging what is shown in the section of the tunnel, as shown in this sketch of two feet to the inch; the vein has a dip—the crevice has a dip—of sixty degrees thirty minutes into the mountain towards the east. Lying upon the foot wall there is a streak of clay which is perfectly continuous, so far as the developments show. That clay is from an inch to six inches thick. It is hard, leathery clay, and one can catch hold of a projecting portion and pull it down as one would the bark from a tree. It is hard and tough. Next to that there is a mixed mass of iron-stained porphyry and clay, the iron having a thickness of from eight to twelve or fourteen inches. Next to that, as shown by the red mark in the sketch of which I am speaking, is a band of iron at a thickness of from two to six or eight inches. I have a specimen of that material with me which I took from the vein. (Hands it to the jury.) That is the nature of the material. I might say further of this crevice, from the examinations I have made of it, and I spent at least an hour on that spot, and examinations I have made of similar appearances in that general locality, I am convinced that that crevice is a plane fault—that is, where the rock, which at one time was continuous, has, by some geological movement, been broken, and one part has fallen down and slid against the
109 other, the result of that sliding process being to grind off and form, under very great pressure, this thin streak of very tough clay which exists and which is represented by the black line.

Passing beyond this crevice at a distance of 156 feet the end of the white porphyry which I have first spoken of is reached and a different rock is encountered; that rock is also porphyry, which differs in color, texture, and structure from the white porphyry first passed through; the difference I have endeavored to show as nearly as I could by the difference in coloring on the sheet. What is called white porphyry has a yellow tint, and what is called a gray porphyry, the rock that is encountered at 156 feet, has a greenish tint and the structure is in oblong blocks rather than the trap form, such as the white porphyry breaks in. At the point where the gray porphyry comes in is a vein or contact of two different rocks; this vein or contact is a seam or crevice, generally extremely thin, but sometimes containing a streak or band of irony material; a short distance further from the gray porphery, about sixty feet, is another similar streak; at the distance of 244 feet from the mouth of the tunnel the end of the gray porphyry is reached—that is, the mass is passed over by the tunnel and white porphyry is again encountered; at the distance of 278 feet from the mouth of the tunnel the same material that forms the surface of the hill there and material very similar to what forms the streets of this city, or rather the plains, is encountered again. It consists of gravel, sand, [and]
broken rock of various kinds filling what appears to have
110 been a channel cut across the direction of the tunnel by
some natural means; that distance through that broken material is about 68 feet; white porphyry is encountered again there; 18 feet from the further extremity of the broken mass there is encountered again another thin crevice of white porphyry. The total length of the tunnel is 388 feet and ends in white porphyry. I might say of this gray porphyry mass that the real thickness is about twelve feet, but the tunnel passing through it very obliquely travels it a distance of about 88 feet before passing entirely through it. I have indicated upon the ground plan the crevice discovered at a distance of 78 feet from the mouth of the tunnel by a red line.

Q. Are you familiar with the general geological formation of the ground covered by the Wells and Moyer and the Moyer placer?

A. Yes, sir.

Q. State whether it is the same with reference to this contact vein which extends through it.

Objected to by plaintiff's counsel because immaterial and irrelevant, the character of the formation, vein, or workings being irrelevant after patent; which objection was overruled by the court; to which ruling the plaintiff, by its counsel, then and there duly excepted.

A. Developments have shown that contact vein extends under it and, presumably, through it.

Q. What is the general dip of this vein that you say is found by development to run into the Moyer and Wells and Moyer, and what is the direction of its dip?

A. The direction of the dip and the degree of the dip varies

111 slightly, but the general direction is east, and the degree of the dip is anywhere from six to fifteen degrees; that would be at an angle something like that (indicating).

Q. From the perpendicular or horizontal?

A. From the horizontal.

Cross-examination by Mr. SYMES:

Q. Mr. Bulkley, what kind of a vein is that that you have described in the tunnel?

A. I haven't described it as a vein. In speaking of it I used the term vein inadvertently once, because while it possesses such characteristics of a vein, as will be determined upon inspection, other necessary characteristics, I think, would have to be determined by analysis. For instance, it has the general indication of lateral extent and extent in depth; that is, it has a very considerable lateral extent in the direction of the strike and dip. The material which is enclosed in it—I have brought a piece with me—*it* looks very much as though it would carry silver and possibly some gold, but to speak positively upon that point is more than I can do. I venture to say it looks like it, and most any miner will agree with me.

Q. You don't consider that a lead, lode, or ledge or vein within the meaning of the statute as a mining expert?

A. I am not a mining expert, sir.

Q. You are not?

A. No, sir.

Q. Haven't you been testifying here as a mining expert for many years in court?

A. No, sir.

Q. What have you testified as?

A. I have testified as a civil and mining engineer, and
112 until this occasion I have always stated I was a civil and mining engineer and stating what my education was and where it was received.

Q. But you say you are not in the habit of testifying as what is generally known as a mining expert?

A. I am sometimes asked if I am testifying as a mining expert, and I always say that I am not.

Q. That is what you always say. Let us get at the facts as to the meaning of that word. When a civil and mining engineer takes the stand, gives theories and facts in connection with them, forms deductions and conclusions as to what is a vein and what is not, what is porphyry rock, what rock is in place and out of place, is he not giving expert testimony?

A. Well, I think upon various circumstances——

Q. Is he not giving expert testimony?

A. I do not consider that I am, sir.

Q. Will you please explain what kind of testimony you think you are giving on such occasions?

The COURT: Well, no. You can take down his opinion of it, and the witness can have his. It is not material to this case.

Q. How many times have you testified as a witness in cases regarding this contact vein in this hill, and what it was with reference to its continuity, its having an apex, and portions of it being in place and out of place?

A. You speak of a contact vein [in] that hill. I presume I have testified twenty-five or fifty times.

Q. Have you testified in any case involving the title to
113 a portion of that vein, where they claimed the right to follow it into the hill by virtue of having the apex, that it was not continuous, and that it was not in place?

A. I have testified that portions of that vein were not continuous; I have testified that portions of that vein were not in place; I have testified that portions of the vein were continuous, and that result has been proven by demonstration; it has been demonstrated by development; different portions of the vein vary very considerably.

Q. That is just the point I desire to ask you about. Is it not a fact that, in your opinion as a mining and civil engineer testifying, *that* you cannot apply any general rule to that vein through that country, with reference to its continuity, or its being in place or out of place?

A. You can apply a general rule; yes, sir.

Q. If you apply a general rule what will that rule be, according to your opinion and your former testimony in numerous cases?

A. I think that I am entitled to explain, perhaps, one thing with reference to portions of the vein being out of place. My testimony has always been given where the vein, or what is called the vein, came very near the surface, where the ground had been broken and disturbed. I have found the vein material mixed with rock, fragments of rock that is not found any place in that neighborhood, that comes from a distance of five or six miles, and when I found vein material and such rock as that mixed I concluded that was out of place; that was near the surface where it had been subjected to great disturbing natural influence. Now, when the mountain is entered——

114 The COURT: That will do. If you have got any question to ask about a fact, that is very well. I will hear no more about what testimony has been given in other cases. I will hear no theories about it being in place or out of place.

Q. Is it not your opinion that a portion of the vein extending under the William Moyer placer is out of place from the point where it outcrops on the hill for over two hundred feet under the mountains as far as at one time developed?

A. In one locality, or perhaps more, yes.

Q. You said that presumably this contact vein extended under the whole of these placer claims?

A. Yes, sir.

Q. Presumably. Why do you presume that from opinions that you advance regarding the facts that it is not always continuous, but sometimes it is?

A. Because workings have followed it continuously into the boundaries of the Wells and Moyer placer without any great change in the characteristics of the vein, followed it in the shape of drifts, while further, over beyond the extremity of the drifts, shafts have been sunk, which at a level with those drifts have reached ore and vein having the same characteristics.

Q. And from that you think it is a continuous vein at these points which you now mention?

A. Yes, sir.

Q. Whereabouts and in what lode claims do you find the top, apex, and outcrop of the portions of the vein you now say you think is continuous?

A. I am unable to say just where the top, outcrop, or apex would be; it is exposed for a long distance laterally, two miles.

115 Q. Do you not find a large portion of the top, outcrop, and apex of the vein that you say extends under the Wells and Moyer placer in the rock and dome and the stone mining claims?

A. Yes; I believe that to be the case.

Q. Those claims belong to the plaintiff company?

A. Yes, sir.

Q. Do you not find the outcrop, top, and apex of a large portion of that contact vein which extends underneath the William Moyer placer in the Iron, Iron Hat, Bull's Eye, and other claims along the west slope of Iron Hill?

A. I am not prepared to say that you do.

Q. It is outside of the Wm. Moyer placer?

A. Yes, sir.

Q. Wherever it is?

A. I judge that to be the case.

Q. It is covered by some lode claim—the top, outcrop, and apex is?

A. Yes, sir; very likely.

Q. Mr. Bulkley, with reference to this seam that you have described and say that you are not prepared to say whether it is a vein or not, is that any part or portion of this contact vein that extends through that country that you have been testifying about?

A. Not properly; no, sir.

Re-direct examination by Mr. REED:

Q. Has it any connection, apparently, with the vein?

A. Almost positively; yes, sir.

The defendant, by its counsel, here offered in evidence the map referred to by the witness Bulkley, which was admitted without objection and is as follows:

(Here follows diagram marked p. 115*a*.)

116 The defendant, by its counsel, here offered in evidence the location certificate of the Gardiner lode, which was introduced by the plaintiff for only one purpose.

Mr. SYMES: We object to the introduction of the location certificate on the part of the defendant for any purpose to show any title to a lode mining claim—

First. Because it has been indisputably shown in the case, and is not denied, that this attempted location of the Gardiner lode claim was made after the date of the application for the William Moyer placer patent.

Second. We object to the introduction of it because there is no proof or evidence of any character that has been introduced tending to show that there ever has been any discovery of a vein or lode or ledge or valuable mineral deposit of rock in place carrying gold, silver, lead, or any other valuable mineral upon which to base a location, and—

Third. Because the witness Hayes, on the part of the defendants, has testified positively that in the discovery shaft of the Gardiner lode, which is about ten or eleven feet deep, there is no vein or lode or mineral deposit of any kind discovered, exposed, or developed.

Fourth. We object, further, because it is shown by the same witness that the Gardiner discovery shaft, upon which the location to that claim and any lode location or possessory title rests, was not excavated or sunk until the year 1879, whereas the applica-
117 tion for the placer patent was made on the 16th day of November, 1878.

Which objections were overruled by the court, and to which ruling of the court in overruling said objections the plaintiff, by its counsel, then and there duly excepted.

Said location certificate is in the words and figures contained in plaintiff's Exhibit "F," to which reference is made.

The defendant, by its counsel, here offered in evidence a deed from George Hays and others to John McGinnis, Jr., which was objected to by plaintiff's counsel because the location certificate shows by its date that no pre-emption title has been acquired, and could not be, after the location of and application for the Wm. Moyer placer patent; which objection was overruled by the court; to which ruling the plaintiff, by its counsel, then and there duly excepted; which deed was marked Defendant's Exhibit "1," and is in words and figures following, to wit:

Book 13, page 577, Doc. 8183. "Copy."

*Geo. Hayes et al. to John McGinnis, Jr. Mining Deed.*

This indenture, made the ninth day of August, in the year of our Lord one thousand eight hundred and seventy-nine, between Maurice Hayes, Geo. C. Gardner, of the county of Lake, State of Colorado, and John Hayes, John McGinnis, Jr., Harvey Durand, and Edward W. McGinnis, by John McGinnis, Jr., his att'y-in-fact, of the county of New York and State of New York, parties of the first part, and John McGinnis, Jr., as trustee, of the county of New York and State of New York, party of the second part, witnesseth:

118 That the said parties of the first part, for and in considera-

tion of the sum of one hundred dollars, lawful money of the United States of America, to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, and forever quit-claimed, and by these presents do grant, bargain, sell, remise, release, and forever quit-claim, unto the said party of the second part and his heirs and assigns our undivided interests in and to the following-described lodes, leads, or deposits situated on the eastern slope of Nugget gulch, California mining district, county of Lake, State of Colorado—the Mike lode, described by metes and bounds as follows: Beginning at cor. No. 1, a pine post set in a mound of stones on the divide between Nugget & California gulches, from whence a blazed pine 16″ diameter bears so. 11 deg. 45′ W. 21.5 ft. (variation in all courses 15 deg. E.), and a blazed pine 6″ diameter bears S. 80 deg. 30′ W. 18.5 feet, and Mount Elbert bears S. 51 deg. W., and the discovery shaft and post bear S. 55 deg. 15′ W. 163.9 feet, and running thence from cor. No. 1 S. 11 deg. E. 750 feet to stake, 1,500 feet to corner No. 2, a pine post; thence S. 79 deg. W. 300 feet to corner No. 3, a pine post in a mound of stones; thence N. 11 deg. W. 750 feet to stake 1,500 feet to corner No. 4, a pine post set in mound of stones, from whence a blazed pine 11″ diameter bears north 46 deg. 45′ W. 13.5 feet, and a blazed pine 12″ diameter bears south 33 deg. E. 14 ft.; thence from cor. No. 4, N. 79 deg. E., 300 ft. to cor. No. 1, the beginning, containing 10.33 acres, being the same lode the former record of which is found in the office of the clerk & recorder for the said county and State—

119 this relocation being made for the purpose of correcting errors in courses and distances and widening to three hundred feet according to law.

The Thomas Starr lode, described by metes and bounds as follows: Beginning at cor. No. 1, a pine post set in a mound of stones on the divide between California and Nugget gulches, being also cor. No. 4 of the Mike lode, from whence a blazed pine 11″ diameter bears N. 48 deg. 45′ W. 12.5 feet (variation in all course 15 deg. E.), and a blazed pine 12″ diameter bears S. 33 deg. E. 74′, and the discovery shaft and post bears N. 71 deg. 44′ E. 165.8 feet, and running thence from cor. No. 1 N. 10 deg. W. 750 — to stake, 1,500 — to cor. No. 2, a pine post, from whence a blazed pine 10″ diameter bears N. 68 deg. 30 E. 2.5 feet, and a blazed pine 12″ diameter bears S. 53 deg. 45′ W. 12 —; thence N. 79 deg. E. 300 ft. to cor. No. 3, a pine post, from whence a blazed pine 8″ diameter bears N. 17 deg. 30′ 11.5 feet, and a blazed pine 12″ diameter bears S. 18 deg. 15′ W. 17 feet; thence from cor. No. 3 S. 11 deg. E. 750 ft., to stake, 1,500 — to cor. No. 4, a pine post, being cor. No. 1 of Mike lode, from whence a blazed pine 16″ diameter bears S. 11 deg. 45′ W. 21.5 ft., and a blazed pine 6″ diameter bears S. 80 deg. 30′ W. 18.5 ft, and Mount Elbert bears S. 51 deg. W.; thence from cor. No. 4 S. 79 deg. W. 300 ft. to cor. No. 1, the beginning, containing 10.30 acres in county of Lake, State of Colorado.

The Goodell lode, described by metes and bounds as follows: Beginning at cor. No. 1, being same as the west center side stake of the

Mike lode, running thence N. 11 deg. W. 750 ft. to stake, same as cor. No. 4 of Mike lode and same as cor. No. 1 of the Thomas Starr lode, and 1,500 ft. to cor. No. 2, being same as west center side stake of Thomas Starr lode; thence S. 79 deg. W. 300 ft. to cor.
120 No. 3; thence S. 11 deg. E. 750 ft. to stake, said stake being over discovery tunnel and the west center side stake of claim, and 1,500 ft. to cor. No. 4; thence N. 79 deg. E. 300 ft. to cor. No. 1, place of beginning. Variation 15 deg. E. Courses given from the true meridian, subject to a pretended placer claim thereon.

The Gardiner lode, described by metes and bounds as follows: Beginning at cor. No. 1, being same as cor. No. 4 of the Goodell lode, and running thence N. 11 deg. W. 750 ft. to stake, being same as west center side stake of Goodell lode; thence S. 79 deg. W. 300 ft. to cor. No. 3; thence S. 11 deg. E. 750 ft. to stake, being stake over discovery tunnel & west center side stake of claim, 1,500 ft. to cor. No. 4; thence N. 79 deg. E. 300 ft. to cor. No. 1 and place of beginning. Variation, 15 deg. E. Courses given from the true meridian, subject to a pretended placer claim thereon.

The Tankerstown lode, described by metes and bounds as follows: Beginning at cor. No. 1, being same as east center side stake of survey No. 441 (Mike lode), and running thence N. 11 deg. W. 750 ft. along east side line of Mike lode to west center side stake of Tankerstown lode, being same as N. E. cor. survey No. 441, from which shaft of Tankerstown lode bears N. 28 deg. E. 100 ft. dist. and 1,500 ft. from cor. No. 1 to cor. No. 2, being same as east center side stake of survey No. 442, Thomas Starr lode; thence no. 79 deg. E. 300 ft. to cor. No. 3; thence S. 11 deg. E. 750 ft. to east center side stake and 1,500 ft. to cor. No. 4; thence S. 79 deg. W. 300 ft. to cor. No. 1 and place of beginning. Variation, 15 deg. east.

The Mike tunnel right: Beginning at Nugget gulch, and from thence bears N. 51 — 30 E., and is situated in the California mining district, Lake county, Colorado; that said tunnel right is taken up for the purpose of developing the Thos. Starr lode, the
121 Mike lode, the Goodell lode, Tankerstown [lode], and the Gardiner lode, also for the purpose of discovering blind lodes, veins, & mineral deposits, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz, rock, and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and the rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, or to the said premises and every part and parcel thereof, with the appurtenances:

To have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns, forever.

It is understood, however, that this deed is given in trust for the purpose of forming a stock company of said mines, and each party

of the first part is to receive stock in said company as his interest thus deeded calls for.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

(S'g'd) HARVEY DURAND. [SEAL.]
GEORGE C. GARDNER. [SEAL.]
EDWARD W. McGINNIS, [SEAL.]
By JOHN McGINNIS, JR., [SEAL.]
*His Att'y-in-Fact.*

122 JOHN McGINNIS, JR. [SEAL.]
JOHN HAYES.
MAURICE HAYES.

Signed, sealed, and delivered in presence of—
—— ——.

STATE OF COLORADO, } ss:
*Lake County,* }

I, Geo. C. Gardner, a notary public in and for said county in the State aforesaid, do hereby certify that Harvey Durand, Edward W. McGinnis, by Jno. McGinnis, Jr., his att'y-in-fact, Jno. McGinnis, Jr., Jno. Hayes, and Maurice Hayes, personally known to me to be the persons whose names are subscribed to the annexed deed, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth, and the said Jno. McGinnis, Jr., also acknowledged that he executed said instrument of writing as the free and voluntary act of said Edward W. McGinnis.

Given under my hand and seal this third day of September, A. D. 1879.

[NOTARIAL SEAL.] (S'g'd) GEO. C. GARDINER,
*Notary Public.*

STATE OF COLORADO, } ss:
*Lake County,* }

I, Rich'd W. Cokell, a notary public in and for said county in the State aforesaid, do hereby certify that George C. Gardner,
123 personally known to me to be the person whose name is subscribed to the annexed deed, appeared before me in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and seal this 3rd day of September, A. D. 1879.

[NOTARIAL SEAL.] RICH. W. COKELL,
*Notary Public.*

Recorded Sept. 3rd, 1879, at 11.45 o'clock a. m.
JOS. H. WELLS, *Recorder.*
F. B. WOODHOUSE, *Dep'ty.*

The defendant, by its counsel, here offered in evidence a certified copy of deed from John McGinnis, Jr., to the defendant, The Mike and Starr Gold and Silver Mining Company; which was objected to by plaintiff's counsel for the same reasons as given to Defendant's Exhibit "1;" which objection was overruled by the court; to which ruling the plaintiff, by its counsel, then and there duly excepted.

Said deed was marked Defendant's Exhibit "2," and is in words and figures following, to wit:

No. 16,665, Book 24, page 200. Copy.

*John McGinnis, Jr., Trustee, to Mike and Starr Gold and Silver Mining Company. Deed.*

This indenture, made the fourth day of December, in the year of our Lord one thousand eight hundred and seventy-nine, between John McGinnis, Jr., as trustee, of the city, county, and State of New York, party of the first part, and The Mike and Starr Gold and Silver Mining Company, a corporation organized under the laws
124 of the State of New York, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of (200,000) twohundred thousand shares of the full-paid non-assessable capital stock of the said Mike and Starr Gold and Silver Mining Company, of the par value of five dollars each, and of one dollar lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, released, and forever quit-claimed, and by these presents doth grant, bargain, sell, remise, release, and forever quit-claim, unto the said party of the second part and to its successors and assigns all the right, title, and interest of the said party of the first part, as trustee, of, in, and to the following-described lodes, leads, or deposits situated on the eastern slope of Nugget gulch, California mining district, county of Lake, State of Colorado, viz.: The Mike lode, described by metes and bounds as follows: Beginning at cor. No. 1, a pine post set in a mound of stones on the divide between Nugget and California gulches, from whence a blazed pine 16 inches diameter bears south 11 degrees 45 minutes west 21.5 feet (variation in all courses, 15 degrees E.), and a blazed pine 6 inches diameter bears south 80 degrees 30 minutes west 18.5 feet, and Mount Elbert bears south 51 degrees west, and the discovery shaft and post bear south 55 degrees 15 minutes west 163.9 feet, and running thence from corner No. 1 south 11 deg. east 750 feet to stake, 1,500 feet to corner No. 2, a pine post; thence south 79 deg. west 300 feet to corner No. 3, a pine post in a mound of stones; thence north 11 deg. west 750 feet to stake 1,500 feet to corner No. 4, a pine post
125 set in mound of stones, from whence blazed pine 11 inches diameter bears north 48 deg. 45 min. west 12.5 feet, and a blazed pine 12 inches diameter bears south 33 deg. E. 14 feet; thence from corner No. 4 north 79 deg. E. 300 feet to corner No. 1, the beginning, containing 10.33 acres, being the same lode the former record of which is found in the office of the clerk and recorder for the

said county of Lake, Colorado, this relocation being made for the purpose of correcting errors in ecurses and distances and widening to three hundred feet according to law.

The Thomas Starr lode, described by metes and bounds as follows: Beginning at cor. No. 1, a pine post set in a mound of stones on the divide between California and Nugget gulches, being also cor. No. 4 of the Mike lode, from whence a blazed pine 11 inches diameter bears north 48 deg. 45 min. west 12.5 feet (variation in all courses, 15 deg. E.), and a blazed pine 12 inches diameter bears south 33 deg. east 74', and the discovery shaft and post bear north 71 deg. 44' east 165.8 feet, and running thence from cor. No. 1 north 10 deg. west 750 feet to stake, 1,500 feet to cor. No. 2, a pine post, from whence a blazed pine 10 inches diameter bears north 68 deg. 30' east 2.5 feet, and a blazed pine 12 inches diameter bears south 53 deg. 45 min. west 12 feet; thence north 79 deg. east 300 feet to cor. No. 3, a pine post, from whence a blazed pine 8 inches diameter bears north 17 deg. 30' east 11.5 feet, and a blazed pine 12 inches diameter bears south 18 deg. 15' west 17 feet; thence from corner No. 3 south 11 deg. east 750 feet to stake, 1,500 feet to cor. No. 4, a pine post, being cor. No. 1 of Mike lode, from whence a blazed pine 16 inches diameter bears south 11 deg. 45 west 21.5 feet, and a blazed pine 6 inches diameter bears south 80 deg. 30' west 18.5 feet, and Mount
126 Elbert bears south 51 deg. west; thence from cor. No. 4 south 79 deg. west 300 feet to cor. No. 1, the beginning, containing 10.30 acres in county of Lake, State of Colorado.

The Goodell lode, described by metes and bounds as follows: Beginning at cor. No. 1, being same as the west center side stake of the Mike lode, running thence north 11 deg. west 750 feet to stake, same as cor. No. 4 of Mike lode and same as cor. No. 1 of the Thomas Starr lode, and 1,500 feet to corner No. 2, being same as west center side stake of Thomas Starr lode; thence south 79 deg. west 300 feet to cor. No. 3; thence south 11 deg. east 750 feet to stake, said stake being over discovery tunnel and the west center side stake of claim, and 1,500 feet to cor. No. 4; thence north 79 deg. east 300 feet to cor. No. 1, place of beginning. Variation, 15 deg. east. Courses given from the true meridian, subject to a pretended placer claim thereon.

The Gardiner lode, described by metes and bounds as follows: Beginning at cor. No. 1, being same as cor. No. 4 of the Goodell lode, and running thence north 11 deg. west 750 feet to stake, being same as west center side stake of Goodell lode, 1,500 feet to cor. No. 2, being same as cor. No. 3 of Goodell lode; thence south 79 deg. west 300 feet to cor. No. 3; thence south 11 deg. east 750 feet to stake, being stake over discovery tunnel and west center side stake of claim, 1,500 feet to cor. No. 4; thence north 79 deg. east 300 feet to cor. No. 1 and place of beginning. Variation, 15 deg. east. Courses given from the true meridian, subject to a pretended placer claim thereon.

The Tankerstown lode, described by metes and bounds as follows: Beginning at cor. No. 1, being same as east center side stake
127 of survey No. 441 (Mike lode), and running thence north

11 deg. west 750 feet along east side line of Mike lode to west center side stake of Tankerstown lode, being same as northeast cor. survey No. 441, from which shaft Tankerstown lode bears north 28 deg. east 100 feet dist. and 1,500 feet from cor. No. 1 to cor. No. 2, being same as east center side stake of survey No. 442, Thomas Starr lode; thence north 79 deg. east 300 feet to cor. No. 3; thence south 11 deg. east 750 feet to east center side stake and 1,500 feet to cor. No. 4; thence south 79 deg. west 300 feet to cor. No. 1 and place of beginning. Variation, 15 deg. east.

The Mike tunnel right: Beginning at Nugget gulch, and from thence bears north 51 deg. 30′ east, and is situated in the California mining district, Lake county, Colorado. Said tunnel right is taken up for the purpose of developing the Thomas Starr lode, the Mike lode, the Goodell lode, the Tankerstown lode, and the Gardiner lode; also for the purpose of discovering blind lodes, veins, and mineral deposits, being the same premises conveyed to the said John McGinnis, Jr., as trustee, by Maurice Hayes, John Hayes, George C. Gardiner, John McGinnis, Jr., Harry Durand, and Edward W. McGinnis, by deed bearing date August 9th, 1879, and recorded in the office of the recorder of deeds, &c., for Lake county, Colorado, in book 13, page 577, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and the rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the said premises, and every part and parcel thereof, with the appurtenances:

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To have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, its successors and assigns, forever.

In witness whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written.

JNO. McGINNIS, JR., *Trustee.* [SEAL.]

Signed, sealed, and delivered in presence of—
WILLIAM H. CLARKSON.
H. DURAND.

STATE OF NEW YORK,
*City and County of New York,* } *ss:*

I, William H. Clarkson, a commissioner of deeds of the State of Colorado in and for the State of New York, residing in the said city of New York, do hereby certify that John McGinnis, Jr., who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as a party thereto, appeared before me this day in person and acknowledged that he executed

the same for the uses and purposes therein mentioned, and that the same is his free and voluntary act and deed as trustee as therein described.

In testimony whereof I have hereunto set my hand and affixed my official seal this 4th day of December, A. D. 1879.

[Commissioner's Seal.]

WILLIAM H. CLARKSON,
129 *Commissioner of Colorado, in New York,*
115 *Broadway, N. Y. City.*

Recorded Feb. 12, 1880, at 10.30 a. m.
(S'g'd) JOS. H. WELLS, *Recorder.*
C. W. INGRAM, *Deputy.*

STATE OF COLORADO, }
*County of Lake,* } *ss:*

I, F. M. Reardon, clerk and recorder in and for said county, in the State aforesaid, do hereby certify that the within and foregoing is a true and correct copy of deed No. 16665, as appears of record in my office, in book 24, page 200.

Witness my hand and official seal this 17 day of November, A. D. 1885.

[SEAL.] F. M. REARDON,
*Clerk and Recorder.*

And thereupon the defendant rested its case.

The foregoing was all the evidence introduced on the trial of this cause.

And thereupon the plaintiff, by its counsel, presented the following motion for judgment:

In the Circuit Court of the United [States] in and for the District of Colorado.

130 THE IRON SILVER MINING COMPANY }
*vs.* } No. 1767.
THE MIKE AND STARR GOLD AND SILVER MINING COMPANY. }

Now comes the said plaintiff company, by its attorneys, and moves the court to instruct the jury to find a verdict for the plaintiff in this case for the following reasons, viz:

Because it is indisputably shown by the testimony that the Gardiner lode claim, claimed by the defendant, was not located or recorded until after the time when the application was made for the patent of the William Moyer placer claim.

Because it is shown by the defendant's own witnesses that the discovery shaft upon the Gardiner claim was not sunk or excavated until some time in the year 1879, and the application was made for the William Moyer placer patent on the sixteenth day of November, 1878.

Because it is shown by the defendant's witnesses that there is no discovery of any vein or lode of quartz or other rock in place bear-

ing any valuable deposits of any kind exposed or developed or found in said discovery shaft.

(Signed) G. G. SYMES AND
F. W. OWERS,
*Attorneys for Plaintiff.*

But the court denied the said motion; to which ruling of the court in denying said motion, the plaintiff, by its counsel, then and there duly excepted.

And thereupon the plaintiff, by its counsel, specially re-
131 quested the court to charge and instruct the jury as follows, to wit:

"This is an action to recover possession of a portion of the William Moyer patented placer mining claim, which is particularly described in the complaint in this action. The plaintiff claims title through a United States patent for the said William Moyer placer mining claim, and deeds from the patentee; and the defendant claims title to a portion of said placer mining claim under an alleged location of a lode mining claim known and called the Gardiner lode."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows, to wit:

"The plaintiff has shown title in fee to the land in controversy in this action by a United States patent therefor, and by deeds of conveyance from the patentee to the plaintiff and its grantors."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows, to wit:

"The jury are instructed that the date of the plaintiff's title in fee is the time when the application was made for the placer patent, which is shown by a certificate of the register and receiver to be the 13th day of November, 1879."

But the court refused to give the same; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

132 The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows, to wit:

"The defendant has attempted to show title to a lode mining claim called the Gardiner lode; it proves an attempt to discover, locate, and record the said lode in the month of February, 1879, on the first day."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows, to wit:

"The jury are instructed that if they believe from the evidence that the application was made for the said William Moyer placer mining patent before the time when the defendant went upon the said ground, or any part thereof, and attempted to discover or locate a lode mining claim by sinking a shaft, making a location and recording a certificate of location of said claim, then they will find for the plaintiff."

But the court refused to give the said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows, to wit:

"The jury are instructed that to enable the defendant to show or prove any title or right to possession to a lode claim within the boundaries of the said patented placer claim for the purpose of having such lode claim excepted from the grant of the placer
133 patent, or brought within the reservation clause in the patent, it must show that it discovered, located, and recorded such lode claim in accordance with the statutes of the United States and of the State of Colorado, and was the owner and held the possessory and pre-emption title to the same before the date of the application for the placer patent."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows, to wit:

"The terms 'vein or lode' and 'vein or lode claim,' as used in section 2333 of the Revised Statutes of the United States, mean and refer to vein or lode mining claims which have been discovered, located, and recorded within the boundaries of a placer claim before the time when the application is made for the placer patent. And unless the jury find from the evidence that the alleged Gardiner lode claim of defendant had been discovered, located, and recorded in accordance with the law governing the location and acquiring title to mining claims before the time when the application was made for the said placer patent, the said lode claim is not excepted or excluded from the grant of the said placer patent, and does not come within the reservation clause in said patent."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by *his* counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows, to wit:

134 "The jury are instructed that the reservation clause in the said William Moyer patent which purports or attempts to reserve or exclude from the grant of said patent known veins or lodes is inserted therein by the officers of the land department without authority of law, and is void and of no effect, and no lodes

or veins or lode or vein mining claims are excepted or excluded from the grant of the said patent by reason of said reservation therein."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows, to wit:

"The jury are instructed that if defendant or its grantors possessed or claimed to be the owners of a lode mining claim within the exterior boundaries of the said placer claim at or before the application for the placer patent *that* to protect their alleged or supposed right or title to such lode claim, and have it excluded or reserved from the grant of the said patent, they were required to file an adverse claim in the land office against the application for the said patent, and set up their possessory right and title to such claim, and bring suit in the local court where the claim was situated to determine their right to the possession of the lode claim; failing to do this, they waived any supposed right or title they may have had to any part of said lode claim, and the law will not permit them to set up or prove any right or title to any portion of the land included within the survey and boundaries of the said placer claim after the issuance of the patent."

But the court refused to give said instruction; to which
135 ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows, to wit:

"To enable parties to establish and prove a title, or the right to possession to a lode mining claim within the exterior boundaries of a patented placer claim, they must prove and show that there is found within the exterior boundaries of such lode claim the top, outcrop or apex of a lode or vein of quartz or other rock in place bearing gold, silver, cinnabar, or other valuable deposits."

But the court refused to give said instructions; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows, to wit:

"The jury are instructed that any person or persons going upon or within the boundaries of a patented placer mining claim and attempting to discover or locate a lode mining claim thereon become trespassers, and can acquire no title or right to possession by such acts."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows, to wit:

"The jury are instructed that a lode claim located or attempted to be located within the exterior boundaries of a placer claim
136 at any time after the time of making the application for patent to the placer claim gives no right or title; any lode so located is not reserved from the grant of the placer patent. This rule applies to all lode claims located between the time of the application for the placer patent and the making of the entry and the issuing of the patent."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows, to wit:

"The jury are instructed that to constitute a valid title to a lode mining claim the locators of such claim are required to make a discovery of a vein, lode, or ledge carrying valuable deposits within the boundaries of such lode claim before the same is located and recorded, and if such discovery is not made the location is void and creates no title or right of possession in the attempted locators; and if the said defendants made no such a discovery of a vein, or lode, or valuable deposit within the boundaries of the said Gardiner lode claim, then they acquired no title or right to possession whatever by virtue of their pretended location."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows, to wit:

"The court instructs the jury that a location of a mining claim is not made by taking possession alone, but by making a discovery, working on the ground, recording and doing whatever else is
137 required by the acts of Congress and the local laws and regulations."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows, to wit:

"The court instructs the jury that the exceptions contained in the patent to the William Moyer placer, in so far as the said exceptions relate to veins or lodes claimed or known to exist at the date of [the] said patent, or the date of the application for said patent, are only inserted in said patent for the benefit of the United States to protect against fraud, and that advantage can only be taken of their insertion by the United States in an action to set the patent aside on the ground of fraud."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows, to wit:

"The court instructs the jury that the locator of a mining claim, such as [the] William Moyer placer, has after his location the exclusive right of possession and enjoyment of all the surface included within the lines of his location, and that any entry made upon such location for the purpose of initiating an adverse title to that of the locator is a trespass, and such title so initiated is absolutely and entirely void and of no effect."

But the court refused to give said instruction; to which
138 ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows, to wit:

"The court instructs the jury that the exceptions contained in the patent to the William Moyer placer, in so far as the said exceptions relate to veins or lodes claimed or known to exist at the date of said patent, or the date of the application for said patent, are so uncertain and vague as not to describe with the accuracy required by law what is intended to be excepted by them, and they are, therefore, void as exceptions."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows, to wit:

"The court instructs the jury that if they believe from the evidence that the vein which, it is claimed, was known to exist prior to the date of application for the William Moyer placer outcrops to the west of said placer and outside of its boundaries, and is one continuous vein dipping into and under said placer, then the property and right of property in that vein belongs to the owners of the locations upon which said outcrop is found, and they have a right to follow the vein on its dip to any depth within the end lines of their locations produced."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

139 The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows, to wit:

"The term 'these present,' found in the reservation clause of the said placer patent, refers to the date of the title in fee conveyed by the patent, which is the date that the application was made for the said patent."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charg and instruct the jury as follows, to wit:

"The court instructs the jury that the patent offered in evidenc by the plaintiff relates back to the date of the location of the Willia Moyer placer, in so far as it may be necessary to cut off intervenin claimants."

But the court refused to give said instruction; to which rulin of the court the plaintiff, by its counsel, then and there duly ex cepted.

And thereupon the court did charge and instruct the jury on it own motion, the whole of the charge being in words as follows, t wit:

"The statute under which the plaintiff's title was obtained, read as follows:

"Where the same person, association, or corporation is in posses sion of a placer claim, and also a vein or lode included within th boundaries thereof, application shall be made for a patent for th placer claim, with the statement that it includes such vein or lode, an in such case a patent shall issue for the placer claim subject to th provisions of this chapter, including such vein or lode, upo 140 the payment of five dollars per acre for such lode claim an twenty-five feet of surface on each side thereof. The re mainder of the placer claim, or any placer claim not embracing an vein or lode claim, shall be paid for at the rate of two dollars an fifty cents per acre, together with all costs of proceedings; and whe a vein or lode, such as described in section twenty-three hundre and twenty, is known to exist within the boundaries of a place claim which does not include an application for the vein or lod claim shall be construed as a conclusive declaration that the claim ant of the placer claim has no right of possession of the vein or lod claim, but where the existence of a vein or lode in a placer claim i not known, a patent for the placer claim shall convey all valuabl mineral and other deposits within the boundaries thereof."

And thereupon the court further charged and instructed the jur on its own motion as follows, to wit:

"The patent shown by plaintiff must prevail in these suits, unles it has been shown on the part of the defendant that there was a vein or lode in the territory covered by these locations, which are called the Goodell and Gardiner, at the time of the issuance of the patent."

To the giving of which portion of the charge of the court plain tiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own mo tion as follows, to wit:

"There must have been a lode or vein in that territory known t the patentee, William Moyer, and there must have been location made upon it as described in the pleadings and maps which have been put before you."

141 To the giving of which portion of the charge of the court the plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion as follows, to wit:

"The evidence tends to prove that the discovery of mineral in these claims was made in a tunnel some time in 1877, I believe. The locations were not made on the surface of the ground until 1879, about the first of February. That was after the application for patent and before the entry, which was about the 21st of February, 1879, and, of course, before the patent was issued."

To the giving of which portion of the charge of the court the plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury *as* on its own motion as follows, to wit:

142 "If there was a lode in that territory, and it was known to Moyer as an existing lode at this time, and by this time I mean the first of February, 1879, or at the time these locations were said to have been made, and the lode had been previously discovered by the locators of these claims, then the placer patent is not sufficient to convey them. In other words, they are excepted by the terms of the statute from the provisions of the patent, and the owners of that title now have no right to them."

To the giving of which portion of the charge of the court the plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion as follows, to wit:

"So that the question for your consideration is of that character, whether prior to the date of these alleged locations, which was in the early part of February, 1879, a lode was known to exist, or that Moyer knew of it at that time, and that locations were made upon it."

To the giving of which portion of the charge of the court the plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion as follows, to wit:

"It has been said by counsel that if the lode had not been discovered in the discovery shaft that would defeat the defendant's title and make good that of the plaintiff; but that is not true. It was not necessary that it should be a location upon which the
143 plaintiff could have resisted the claim of parties who were claiming under lode locations. It was enough if it was a visible and open location upon the surface, one which might be made good thereafter if not then good, and a lode was known to exist—known to Moyer. When the statute speaks of its being known it means known to the patentee."

To the giving of which portion of the charge of the court the plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion as follows, to wit:

"I would say something to you as to the question whether it was known to Stevens, who subsequently became the grantee of this claim, and not to Moyer, but I think the evidence tends equally to prove that it was known to Moyer if it was known to Stevens; therefore I shall not raise any distinction upon that point. Perhaps there might be a distinction presented, but I do not think it is important in this case. If you find that it was known to Stevens I think you may find upon the same evidence that it was known to Moyer. If it was not known to Moyer, then of course it matters not whether it was known to other people."

To the giving of which portion of the charge of the court the plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion as follows, to wit:

"The point upon this statute (section 2333) is that if the patentee of a placer claim, one who seeks to obtain a patent under a placer location, knows of the existence of a lode within the placer at
144 the time of making his entry and obtaining his patent, does not include it in his application, does not proceed for that lode as a lode, thereby under the terms of the statute he makes a conclusive declaration that he has no right of possession of the lode, and that defeats his title altogether."

To the giving of which portion of the charge of the court the plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion as follows, to wit:

"I think that is all, gentlemen, that there is in the case. I do not know that it is necessary to repeat it again, that the plaintiff's title must prevail unless it appears to you from the evidence that there was a lode existing in the ground, and that Moyer knew it at the time of making his entry and obtaining his patent, and that a location had been made upon it in a general way; that there was a certificate made; that there was a discovery of mineral within the claims, and that the lode was staked upon the surface, and the like."

To the giving of which portion of the charge of the court the plaintiff, by its counsel, then and there duly excepted.

And thereupon the jury returned a verdict for the defendant.

And thereupon the plaintiff filed its motion for a new trial, which said motion is in words and figures following, to wit:

145 In the Circuit Court of the United States for the District of Colorado, in the Eighth Circuit.

THE IRON SILVER MINING COMPANY
*vs.*
THE MIKE AND STARR GOLD AND SILVER MINING COMPANY. } No. 176.

And now comes the said plaintiff, by its attorneys aforesaid, and moves the court to set aside the verdict and judgment rendered in this action, and to grant a new trial in this cause, and for grounds of its motion the plaintiff shows to the court the following, to wit:

I. The court admitted on the trial improper evidence on the part of the said defendant; that is to say, the court permitted witnesses for defendant to testify regarding the character of the mining ground in dispute, whether placer mining ground or lode or vein mining ground, and also permitted the defendant's witnesses to testify regarding what patentee Moyer said or knew about there being a lode or vein of rock in place underneath the surface of the said placer claim, and also *per*mitted evidence regarding what was said by one William H. Stevens, as to his object in obtaining patent titles to the said mining ground and mining ground in the vicinity, and also admitted evidence of witnesses regarding the general supposition or opinion of different persons as to whether there was or not a vein or lode of quartz or other rock in place carrying valuable deposits underneath the surface of the said patented placer claim.

II. The court improperly refused to give the jury each and
146 every or any of the instructions asked by the plaintiff.

III. The court improperly charged and instructed the jury that the defendant could show title to a lode or vein mining claim within the exterior boundaries of the said placer claim after the date of the application for the said placer patent.

IV. The court also improperly instructed the jury that the defendant could show a right or title to the said Gardiner lode mining claim without showing a compliance with the statutes of the State of Colorado and of the United States regarding the discovery, location, and record necessary to give the possessory title to a lode mining claim.

V. And the court improperly charged the jury that the defendant might show a location or record or title to the said lode mining claim at any time before the date when the said placer patent issued.

VI. The verdict is contrary to the law and the evidence in the case.

(Signed) G. G. SYMES AND
F. W. OWERS,
*Attorneys for Plaintiff.*

But the court overruled said motion and gave judgment on the verdict of the jury for the defendant and against the plaintiff.

To which ruling of the court in so overruling said motion and giving judgment as aforesaid the plaintiff, by its counsel, then and there duly excepted.

And forasmuch as the matters and things above set forth
147 do not fully appear of record the said plaintiff tenders this its bill of exceptions, and prays that the same may be signed and sealed by the judge of this court, pursuant to the statute in such cases made and provided, which is done accordingly this 15 day of January, A. D. 1886, at the city of Denver, in said district.

(S'g'd) MOSES HALLETT, [SEAL.]
*Dist. Judge.*

And the said assignment of errors is in words and figures as follows, to wit:

*Assignment of Errors.*

UNITED STATES OF AMERICA, *ss:*

In the Supreme Court.

THE IRON SILVER MINING COMPANY, Plaintiff in Error,

*vs.*

THE MIKE AND STARR GOLD AND SILVER MINING COMPANY, Defendant in Error.

The plaintiff in error now comes and says that in the record of the proceedings in this cause there is manifest error in this, to wit:

First. The court below erred in overruling the objections of the plaintiff in error to interrogatories put to the witness, George Leonhardy, relating to the proximity of lode mining claims to the William Moyer placer.

Second. The court below erred in overruling the objection of the plaintiff in error to the admission of any testimony relating to the existence of any veins, leads, lodes, ledges, or deposits of
148 metalliferous rock in place in the vicinity of or in proximity to the William Moyer placer.

Third. The court below erred in overruling the objection of the plaintiff in error to the admission of any testimony relating to the examination made by any witness of any vein, lead, lode, ledge, or deposit of metalliferous rock in place in the vicinity of or in proximity to the William Moyer placer, and to the admission of any testimony showing, or tending to show, the results of such examinations.

Fourth. The court below erred in overruling the objection of the plaintiff in error to the interrogatory put to the witness Leonhardy, as follows: "State whether or not during the times, or any of them that you have mentioned, there was any knowledge among the people in that vicinity or neighborhood as to the existence or non-existence of any vein or deposit of mineral ore underneath the premises now known as the William Moyer placer."

Fifth. The court below erred in overruling the objection of the plaintiff in error to the interrogatory put to the witness Leonhardy, as follows: "What is meant by placer deposits?"

Sixth. The court below erred in overruling the objection of the plaintiff in error to the interrogatory put to the witness Leonhardy, as follows: "What proportion, if you know, of the William Moyer placer claim is what is known, or might be termed among miners, as placer ground?"

Seventh. The court below erred in overruling the objection of the plaintiff in error to the admission *in* testimony on the part of the defendant in error relating to any conversation or conversa-
149 tions had with one W. H. Stevens or any other person about the premises included in the William Moyer placer patent in the spring of 1877 or at any time before or since.

Eighth. The court below erred in overruling the objection of the plaintiff in error to the interrogatory put to the witness, C. C. Baldwin, as follows: "What is the direction of it (the Mike tunnel) with reference to the Goodell and Gardiner lodes?"

Ninth. The court below erred in overruling the objection of the plaintiff in error to the interrogatory put to the witness, Michael C. Norris, as follows: "Do you know the Mike lode, and how long have you known it?"

Tenth. The court below erred in overruling the objection of the plaintiff in error to the interrogatory put to the witness, John Hayes, as follows: "Do you know the Mike lode, and did you ever work on it?"

Eleventh. The court below erred in overruling the objection of the plaintiff in error to the interrogatory put to the witness, John Hayes, as follows: "How far did you run the Mike tunnel, and did you discover in that Mike tunnel any veins?"

Twelfth. The court below erred in overruling the objection of the plaintiff in error to the interrogatory put to the witness, Fred. G. Bulkley, as follows: "Describe them (the Goodell and Gardiner lodes) throughout now, what they represent—both of them."

Thirteenth. The court below erred in overruling the ob-
150 jection of the plaintiff in error to the interrogatory put to the witness Bulkley, as follows: "State whether it (the geological formation) is the same with reference to this contact vein which extends through it."

Fourteenth. The court below erred in overruling the objection of the plaintiff in error to the admission as evidence of the location certificate offered by defendant in error.

Fifteenth. The court below erred in overruling the objection of the plaintiff in error to the admission as evidence on the part of the defendant in error of the deed from George Hayes and others to John McGinnis, Jr., as trustee.

Sixteenth. The court below erred in overruling the objection of the plaintiff in error to the admission as evidence on the part of the defendant in error of deed from John McGinnis, Jr., trustee, to the defendant in error, The Mike and Starr Gold and Silver Mining Company.

Seventeenth. The court below erred in overruling the motion for judgment made by the plaintiff in error immediately after defendant in error closed its case.

Eighteenth. The court below erred in refusing to give to the jury the first instruction asked for by plaintiff in error, as follows: "This is an action to recover possession of a portion of the William Moyer patented placer mining claim, which is particularly described in the complaint in this action. The plaintiff claims title through a United States patent for the said William Moyer placer mining claim and deeds from the patentee, and the defendant claims title to a
151 portion of said placer mining claim under an alleged location of a lode mining claim known and called the Gardiner lode."

Nineteenth. The court below erred in refusing to give to the jury the second instruction asked for by plaintiff in error, as follows: "The plaintiff has shown title in fee to the land in controversy in this action by a United States patent therefor and by deeds of conveyance from the patentee to the plaintiff and its grantors."

Twentieth. The court below erred in refusing to give to the jury the third instruction asked for by plaintiff in error, as follows: "The jury are instructed that the date of the plaintiff's title in fee is the time when the application was made for the placer patent, which is shown by a certificate of the register and receiver to be the 13th day of November, 1879."

Twenty-first. The court below erred in refusing to give to the jury the fourth instruction asked for by plaintiff in error, as follows: "The defendant has attempted to show title to a lode mining claim called the Gardiner lode; it proves an attempt to discover, locate, and record the said lode in the month of February, 1879, on the first day."

Twenty-second. The court below erred in refusing to give to the jury the fifth instruction asked for by plaintiff in error, as follows: "The jury are instructed that if they believe from the evidence that the application was made for the said William Moyer placer mining patent before the time when the defendant went upon the said ground, or any part thereof, and attempted to discover or locate a lode mining claim by sinking a shaft, making a location, and
152 recording a certificate of location of said claim, then they will find for the plaintiff."

Twenty-third. The court below erred in refusing to give to the jury the sixth instruction asked for by plaintiff in error, as follows: "The jury are instructed that to enable the defendant to show or prove any title or right to possession to a lode claim within the boundaries of the said patented placer claim, for the purpose of having such lode claim excepted from the grant of the placer patent or brought within the reservation clause in the patent, it must show that it discovered, located, and recorded such lode claim in accordance with the statutes of the United States and of the State of Colorado, and was the owner and held the possessory and pre-emption title to the same before the date of the application for the placer patent."

Twenty-fourth. The court below erred in refusing to give to the jury the seventh instruction asked for by plaintiff in error, as fol-

lows: "The terms 'vein or lode' and 'vein or lode claim,' as used in section 2333 of the Revised Statutes of the United States, mean and refer to vein or lode mining claims which have been discovered, located, and recorded within the boundaries of a placer claim before the time when the application is made for the placer patent; and unless the jury find from the evidence that the alleged Gardiner lode claim of defendant had been discovered, located, and recorded in accordance with the law governing the location and acquiring title to mining claims before the time when the application was made for the said placer patent, the said lode claim is not excepted or excluded from the grant of the said placer patent,
153 and does not come within the reservation clause in said patent."

Twenty-fifth. The court below erred in refusing to give to the jury the eighth instruction asked for by plaintiff in error, as follows: "The jury are instructed that the reservation clause in the said William Moyer patent, which purports or attempts to reserve or exclude from the grant of said patent known veins or lodes, is inserted therein by the officers of the land department without authority of law and is void and of no effect, and no lodes or veins or lode or vein mining claims are excepted or excluded from the grant of the said patent by reason of said reservation therein."

Twenty-sixth. The court below erred in refusing to give to the jury the ninth instruction asked for by plaintiff in error, as follows: "The jury are instructed that if defendant, or its grantors, possessed or claimed to be the owners of a lode mining claim within the exterior boundaries of the said placer claim at or before the time of the application for the placer patent, that to protect their alleged or supposed right or title to such lode claim and have it excluded or reserved from the grant of the said patent they were required to file an adverse claim in the land office against the application for the said patent and set up their possessory right and title to such claim and bring suit in the local court where the claim was situated, to determine their right to the possession of the lode claim; failing to do this they waived any supposed right or title they may have had to any part of said lode claim, and the law will not permit them to set up or prove any right or title to any portion of the land included within the survey and boundaries of the said placer claim after the issuance of the patent."

154 Twenty-seventh. The court below erred in refusing to give to the jury the tenth instruction asked for by plaintiff in error, as follows: "To enable parties to establish and prove a title or the right *to* possession to a lode mining claim within the exterior boundaries of a patented placer claim they must prove and show that there is found within the exterior boundaries of such lode claim the top, outcrop, or apex of a lode or vein of quartz or other rock in place bearing gold, silver, cinnabar, or other valuable deposits."

Twenty-eighth. The court below erred in refusing to give to the jury the eleventh instruction asked for by plaintiff in error, as follows: "The jury are instructed that any person or persons going

upon or within the boundaries of a patented placer mining claim and attempting to discover a lode mining claim thereon become trespassers and can acquire no title or right to possession by such acts."

Twenty-ninth. The court below erred in refusing to give to the jury the twelfth instruction asked for by plaintiff in error, as follows: "The jury are instructed that a lode claim located or attempted to be located within the exterior boundaries of a placer claim at any time after the time of making the application for patent to the placer claim gives no right or title; any lode so located is not reserved from the grant of the placer patent. This rule applies to all lode claims located between the time of the application for the placer patent and the making of the entry and the issuing of the patent."

155 Thirtieth. The court below erred in refusing to give to the jury the thirteenth instruction asked for by plaintiff in error, as follows: "The jury are instructed that to constitute a valid title to a lode mining claim the locators of such claim are required to make a discovery of a vein, lode, or ledge carrying valuable deposits within the boundaries of such lode claim before the same is located and recorded, and if such discovery is not made the location is void and creates no title or right of possession in the attempted locators; and if the said defendant made no such a discovery of a vein or lode or valuable deposit within the boundaries of the said Gardiner lode claim, then they acquired no title or right to possession whatever by virtue of their pretended location."

Thirty-first. The court below erred in refusing to give to the jury the fourteenth instruction asked for by plaintiff in error, as follows: "The court instructs the jury that a location of a mining claim is not made by taking possession alone, but by making a discovery, working on the ground, recording, and doing whatever else is required by the acts of Congress and the local laws and regulations."

Thirty-second. The court below erred in refusing to give to the jury the fifteenth instruction asked for by plaintiff in error, as follows: "The court instructs the jury that the exceptions contained in the patent to the William Moyer placer, in so far as the said exceptions relate to veins or lodes claimed or known to exist at the date of said patent or the date of the application for said patent, are only inserted in said patent for the benefit of the United States

156 to protect against fraud, and that advantage can only be taken of their insertion by the United States in an action to set the patent aside on the ground of fraud."

Thirty-third. The court below erred in refusing to give to the jury the sixteenth instruction asked for by plaintiff in error, as follows: "The court instructs the jury that the locator of a mining claim such as William Moyer placer has, after its location, the exclusive right of possession and enjoyment of all the surface included within the lines of his location, and that any entry made upon such location for the purpose of initiating an adverse title to that of the locator is a trespass, and such title so initiated is absolutely and entirely void and of no effect.

Thirty-fourth. The court below erred in refusing to give to the jury the seventeenth instruction asked for by plaintiff in error, as follows: "The court instructs the jury that the exceptions contained in the patent to the William Moyer placer, in so far as the said exceptions relate to veins or lodes claimed or known to exist at the date of said patent or the date of the application for said patent, are so uncertain and vague as not to describe with the accuracy required by law what is intended to be excepted by them, and they are therefore void as exceptions."

Thirty-fifth. The court below erred in refusing to give to the jury the eighteenth instruction asked for by the plaintiff in error, as follows: "The court instructs the jury that if they believe from the evidence that the vein, which it is claimed was known to exist prior te the date of application for the William Moyer placer, outcrops to the west of said placer and outside of its boundaries, and is
157 one continuous vein, dipping into and under said placer, then the property and right of property in that vein belongs to the owners of the locations upon which said outcrop is found, and they have a right to follow the vein on its dip to any depth within the lines of their locations produced."

Thirty-sixth. The court below erred in refusing to give to the jury the nineteenth instruction asked for by plaintiff in error, as follows: "The term 'these presents,' found in the reservation clause of the said placer patent, refers to the date of the title in fee conveyed by the patent, which is the date that the application was made for the said patent."

Thirty-seventh. The court below erred in refusing to give to the jury the twentieth instruction asked for by plaintiff in error, as follows: "The court instructs the jury that the patent offered in evidence by the plaintiff relates back to the date of the location of the William Moyer placer, in so far as it may be necessary to cut off intervening claimants."

Thirty-eighth. The court below erred in giving the jury the following instruction: "The patent shown by plaintiff must prevail in these suits unless it has been shown on the part of the defendant that there was a vein or lode in the territory covered by these locations which are called the Goodall and Gardiner at the time of the issuance of the patent."

158 Thirty-ninth. The court below erred in giving the following instruction: "There must have been a lode or vein in that territory known to the patentee, William Moyer, and there must have been locations made upon it as described in the pleadings and maps which have been put before you."

Fortieth. The court below erred in giving the jury the following instruction: "The evidence tends to prove that the discovery of mineral in these claims was made in a tunnel some time in 1877, I believe; the locations were not made on the surface of the ground until 1879, about the first of February. That was after the application for patent and before the entry, which was about the 21st of February, 1879, and, of course, before the patent was issued."

Forty-first. The court below erred in giving the jury the following instruction: "If there was a lode in that territory, and it was known to Moyer as an existing lode at this time, and by this time, I mean the first of February, 1879, or at the time these locations were said to have been made, and the lode had previously been discovered by the locators of these claims, then the placer patent is not sufficient to convey them. In other words, they are excepted by the terms of this statute from the provisions of the patent, and the owners of that title now have no right to them."

Forty-second. The court below erred in giving the jury the following instructions: "So that the question for your consideration is of that character whether, prior to the date of these alleged locations, which was in the early part of February, 1879, a lode was known to exist, or that Moyer knew of it at that time, and that locations were made upon it."

159 Forty-third. *That* court below erred in giving the jury the following instruction: "It has been said by counsel that if the lode had not been discovered in the discovery shafts that would defeat the defendant's title and make good that of the plaintiff; but that is not true. It was not necessary that it should be a location upon which the plaintiff could have resisted the claims of parties who were claiming under lode locations. It was enough if it was a visible and open location upon the surface, one which might be made good thereafter if not then good, and a lode was known to exist—known to Moyer. When the statute speaks of its being known it means known to the patentee.

Forty-fourth. The court below erred in giving the jury the following instruction: "I would say something to you as to the question whether it was known to Stevens, who subsequently became the grantee of this claim, and not to Moyer; but I think the evidence tends equally to prove that it was known to Moyer if it was known to Stevens; therefore I shall not raise *my* distinction upon that point. Perhaps there might be a distinction presented, but I do not think it is important in this case. If you find that it was known to Stevens I think you may find upon the same evidence that it was known to Moyer. If it was known to Moyer, then, of course, it matters not whether it was known to other people."

Forty-fifth. The court below erred in giving the jury the following instruction: "The point upon this statute (section 2333) is that if the patentee of a placer claim, who seeks to obtain a patent under a placer location, knows of the existence of a lode within the placer at the time of making his entry and obtaining his patent, does not include it in his application, does not proceed for that lode as
160 a lode, thereby under the terms of the statute he makes a conclusive declaration that he has no right of possession of the lode, and that defeats his title altogether."

Forty-sixth. The court below erred in giving the jury the following instruction: "I think that is all, gentlemen, that there is in the case. I do not know that it is necessary to repeat it again that the plaintiff's title must prevail unless it appears to you from the evidence that there was a lode existing in the ground and that

Moyer knew it at the time of making his entry and obtaining his patent, and that a location had been made upon it in a general way; that there was a certificate made; that there was a discovery of mineral within the claims, and that the lode was staked upon the surface, and the like."

Forty-seventh. The court below erred in overruling the motion for a new trial made by plaintiff in error and the giving of judgment on the verdict of the jury.

Wherefore and by reason of the said errors the plaintiff in error prays that the said judgment may be wholly set aside, reversed, annulled, and for naught held, and that the said plaintiff in error may be restored to its rights in the premises in every manner and respect as though the said judgment had not been rendered.

(S'g'd) GEORGE G. SYMES,
FRANK W. OWERS,
*Att'ys for Pl'ff in Error.*

161 (Endorsed:) 1767. In U. S. circuit court. The Iron Silver M'g Co. *vs.* The Mike and Starr Gold and Silver Mining Co. Bill of exceptions and assignment of errors. Filed Jan. 15, 1886. (S'g'd) Edward F. Bishop, clerk.

UNITED STATES OF AMERICA, } ss:
*District of Colorado,* }

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceeding heretofore had and entered of record in said court and in a certain cause lately in said court pending, wherein The Iron Silver Mining Company was plaintiff and The Mike and Starr Gold and Silver Mining Company was defendant, as fully and completely as the same still remain on file and of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 9th day of March A. D. 1886.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

Clerk's fees:

| | |
|---|---|
| Preparing transcript, 486 fol's, at 10c. | 48 60 |
| Making three maps | 9 00 |
| Certificate and seal | 35 |
| | $57 95 |

Paid by pl'ff in error.

Endorsed on cover: Colorado C. C. U. S. No. 858. The Iron Silver Mining Company, plaintiff in error, *vs.* The Mike & Starr Gold & Silver Mining Company. Filed March 13, 1886.

# In the Supreme Court

## Of the United States.

OCTOBER TERM, A. D. 1888.

THE IRON SILVER MINING COMPANY,
Plaintiff in Error,
vs.
THE MIKE AND STARR GOLD AND SILVER MINING COMPANY,
Defendant in Error.

No. 231.

Error to the Circuit Court of the United States for the District of Colorado.

## BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

FRANK W. OWERS,
*Of Counsel for Plaintiff in Error.*

PIERSON & WILLIAMS, LEGAL PRINTERS, DENVER, COLO.

# In the Supreme Court

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| THE IRON SILVER MINING COMPANY, Plaintiff in Error, vs. THE MIKE AND STARR GOLD AND SILVER MINING COMPANY, Defendant in Error. | No. 231. Error to the Circuit Court of the United States for the District of Colorado. |

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STATEMENT OF THE CASE.

On the 10th day of July, 1878, William Moyer and three others located a portion of the public mineral domain of the United States as a placer, calling same the William Moyer placer.

On November 13th, 1878, Moyer applied for a patent for the ground located, and on the 21st of February, 1879, entered and paid for the land, and received a Receiver's receipt therefor, and thereafter, on the 30th day of January, 1880, a United States patent was issued to him for the ground so located, comprising 56 69-100 acres, more or less, (record, page 19), which patent contains the following exception or reservation: "That should any vein or lode of quartz, or other rock in place-bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, be claimed

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or known to exist within the above-described premises at the date hereof, the same is expressly excepted and excluded from these presents."

The plaintiff in error, subsequently and prior to this suit, by various deeds of conveyance, became the grantee of the locators and patentee of the placer.

On the 11th day of March, 1879, Maurice Hayes and others filed with the County Clerk and Recorder of Lake County, Colorado, a location certificate of the Goodell lode claim. (Record, 29.) The premises described in said certificate lie wholly within the boundaries of the said Moyer placer. The certificate recites, among other things, that the Goodell lode was located on the 1st day of February, 1879, or three months after the date of the application for the patent to the William Moyer placer. Subsequently, and on the 13th day of April, 1881, the defendant in error made application in the United States Land Office at Leadville to be allowed to enter and pay for the said Goodell lode. To this application plaintiff in error filed in the U. S. Land Office at Leadville, Colorado, a protest, setting forth that the land for which claimants of the Goodell lode sought to obtain a patent, was already patented as the William Moyer placer. This protest was sustained by the Interior Department (Copp's Land Owner, Vol. 10, p. 150), but permission was given to re-apply for a patent for a strip 25 feet in width on either side of the Goodell lode. This new application was made December 11th, 1885. Thereupon the plaintiff in error, fearing that a failure so to do might jeopardize some of its legal rights, filed in said land office, within the time provided by law under the provision of section 2325 of the Revised Statutes of the United States, an adverse claim against said new application for patent, and this suit was brought by plaintiff in error in support of the said adverse claim, in pursuance of the United States statute in such case made and provided.

This is an action of ejectment brought under the provisions of said Section 2325 of the Revised Statutes, which, while being formally to recover the possession of that portion of the premises described in the patent to the William Moyer placer, which is described in the location certificate of said Goodell lode, and in the application for patent therefor, is really in effect, a suit to prevent the issuance of a patent by the United States Land Office to the Goodell lode, and defendants, to legally recover, must have

proved their case affirmatively, and to have recovered or successfully defended must have shown a valid location.

Bay State Co. vs. Brown, 21 Fed Rep., 167.
Jackson vs. Roby, 109 U. S., 440.
McGinnis vs. Egbert, 8 Colo., 41.
Rosenthal vs. Ives, 12 Pac. Rep., 904.

Complaint was filed on the 20th day of February, A. D. 1885, by the plaintiff in error, alleging an ouster by defendant in error of possession of plaintiff in error of the William Moyer placer, the fee simple title to which plaintiff in error claimed to hold by virtue of United States patent therefor.

On the 22d day of April, 1885, defendant in error filed its answer denying the allegations of the complaint and setting up four defenses to the action. The first is a general denial. The second being an allegation that at the time of the location of the said Moyer placer claim, and the certificate thereto, and at the time of application for patent therefor, and at the time of the entry of said placer, and at the time of the issuance and grant of said patent, a lode, vein or deposit of mineral, of quartz and other rock in place carrying carbonates of lead and silver, was known to exist and was claimed within the boundaries of the said William Moyer placer (Survey 300), and the fact that said vein was claimed and did exist within the said premises, was known to the patentee of said placer at all the times before mentioned. The third is a claim to the title of the premises described in the location certificate of the Goodell lode on the ground that the vein so known and claimed to exist was known and claimed as the Goodell lode, and the fourth is a claim to the title to certain premises in the answer described and called the Mike lode.

To this answer a replication was filed on the 15th day of October, A. D., 1885, which denies the allegations of the answer, except that it admits the pretended location of the Goodell lode within the placer; denies that such location could be legally made, and avers that no top, outcrop or apex or any part of any vein or lode has ever been discovered or exposed by defendants in error or their grantors or their predecessors in interest, within the boundaries of said patented lode claim, or within the boundaries of the William Moyer placer. The case is before this court on writ of error sued out December 5th, 1885.

The evidence introduced on behalf of the plaintiff in error, was, with the exception of the testimony of F. T. Freeland, intro-

duced for the purpose of identification of maps, purely documentary, and consisted of its chain of title, the patent of the United States for the William Moyer placer, the certificate of the Register of the United States Land Office, Leadville, Colorado, as to the date of the application for patent for the placer and a certified copy of the location certificate of the Goodell lode claim, said location certificate being introduced as stated at the trial (record 29) for the sole and only purpose of fixing the date of the pretended location of that lode claim.

## Assignment of Errors.

Among the errors assigned by the plaintiff in error and which are relied upon by it, are errors committed by the Court below in admitting and refusing to admit certain evidence, and in refusing to give certain instructions asked for by plaintiff in error, and in the giving of certain other instructions and in rendering its judgment, and are here set forth.

1. Because the Court erred in admitting evidence as to the existence of lode claims in the vicinity of, or in proximity to, the William Moyer placer, for the purpose of proving a knowledge of the existence of lodes within the placer.

2. Because the Court erred in admitting evidence as to the existence of lode claims not located or discovered prior to November 13th, 1878, when the patent for the Moyer placer was applied for, and not shown to have been located or discovered within the boundaries of the William Moyer placer.

3. Because the Court erred in admitting evidence as to the mere staking and location of lode claims in the vicinity of the William Moyer placer without first compelling the foundation to to be laid by proof of the discovery of a lode within the boundaries of the claims, the staking and location of which was sought to be established.

4. Because the Court erred in admitting evidence as to the existence of veins or lodes within the boundaries of the William Moyer placer, based upon the workings and developments made since the date of the application for the patent to the placer, to wit: 13th day of November, 1878.

5. Because the Court erred in admitting evidence of conversations had with one W. H. Stevens relative to the existence of veins without the boundaries of the placer and relative to the expression of ideas, theories, beliefs and intentions by said Stevens in regard to the existence of veins within the boundaries of the placer.

6. Because the Court erred in admitting in evidence the location certificate of the Goodell lode, introduced by the defendant in error for the purpose of showing title, and in admitting the in-

troduction of the several deeds of conveyance through which defendant in error traces its title from said location certificate.

7. Because the Court erred in refusing to instruct the jury that the plaintiff had shown title in fee to the land in controversy by United States patent therefor and by deeds of conveyance from patentee and his grantees, and that the date of the plaintiff's title in fee relates to the time when application was made for the placer patent, which was shown by the certificate of the Register and Receiver, to be the 13th day of November, 1879.

8. Because the Court erred in refusing to instruct the jury "that if they (the jury) believed from the evidence that the application was made for the said William Moyer placer patent before the time when the said defendant went upon the said ground or any part thereof, and attempted to discover and locate a lode mining claim by sinking a shaft, making a location and recording a certificate of location of said claim, then they will find for the plaintiff."

9. Because the Court erred in refusing to give to the jury the sixth instruction asked for by plaintiff in error, as follows: "The jury are instructed that to enable the defendant to show or prove any title or right to possession to a lode claim within the boundaries of the said patented placer claim for the purpose of having such lode claim excepted from the grant of the placer patent, or brought within the reservation clause in the patent, it must show that it discovered, located and recorded such lode claim in accordance with the statutes of the United States and the State of Colorado, and was the owner and held possessory and pre-emption title to the same before the date of the application for the placer patent."

10. Because the Court erred in refusing to give to the jury the tenth instruction asked for by the plaintiff in error, as follows: "To enable parties to establish and prove a title or the right to possession to a lode mining claim within the exterior boundaries of a patented placer claim, they must prove and show that there is found within the exterior boundaries of such lode claim the top, outcrop or apex of a lode or vein of quartz or other rock in place bearing gold, silver, cinnabar, or other valuable deposits."

11. Because the Court erred in refusing to give to the jury the eleventh instruction asked for by the plaintiff in error, as follows: "The jury are instructed that any person or persons going upon or within the boundaries of a patented placer mining claim and attempting to discover or locate a lode mining claim thereon, become trespassers, and can acquire no title or right to possession by such acts."

12. Because the Court erred in refusing to give to the jury the twelfth instruction asked for by the plaintiff in error, as follows: "The jury are instructed that a lode claim located or attempted to be located within the exterior boundaries of a placer claim at any time after the time of making the application for

patent to the placer claim gives no right or title; any *claim* so located is not reserved from the grant of the placer patent."

13. Because the Court erred in refusing to give to the jury the sixteenth instruction asked for by plaintiff in error, as follows: "The Court instructs the jury that the locator of a mining claim, such as (the) William Moyer placer, has, after his location, the exclusive right of possession and enjoyment of all the surface included within the lines of his location and that any entry made upon such location for the purpose of initiating an adverse title to that of the locator is a trespass, and such title so initiated is absolutely and entirely void and of no effect."

14. Because the Court erred in giving the following instruction: "The patent shown by plaintiff must prevail in these suits, unless it has been shown, on the part of the defendant, that there was a vein or lode in the territory covered by these locations, which are called the Goodell and Gardiner, at the time of the issuance of the patent."

15. Because the Court erred in giving the following instruction: "There must have been a vein or lode in that territory known to the patentee, William Moyer, and there must have been locations made upon it as described in the pleadings and maps which have been put before you."

16. Because the Court erred in giving the following instruction: "The evidence tends to prove that the discovery of mineral in these claims was made in a tunnel sometime in 1877, I believe; the locations were not made on the surface of the ground until 1879, about the first of February. That was after the application for patent and before the entry, which was about the 21st of February, 1879, and, of course, before the patent was issued."

17. Because the Court erred in giving the following instruction: "If there was a lode in that territory, and it was known to Moyer as an existing lode at this time, and by this time I mean the 1st of February, 1879, or at the time these locations were said to have been made, and the lode had previously been discovered by the locators of these claims, then the placer patent is not sufficient to convey them. In other words, they are excepted, by the terms of this statute, from the provisions of the patent, and the owners of that title now have no right to them."

18. Because the Court erred in giving the following instruction: "So that the question for your consideration is of that character whether, prior to the date of these alleged locations, which was in the early part of February, 1879, a lode was known to exist, or that Moyer knew of it at that time, and that locations were made upon it."

19. Because the Court erred in giving the following instruction: "It has been said by counsel that if the lode had not been discovered in the discovery shafts, that would defeat defendants' title and make good that of the plaintiff; but that is not true. It was not necessary that it should be a location upon which the

plaintiff could have resisted the claims of parties who were claiming under lode locations. It was enough if it was a visible and open location upon the surface, one which might be made good thereafter, if not then good, and a lode was known to exist, known to Moyer. When the statute speaks of its being known, it means known to the patentee."

20. Because the Court erred in giving the following instruction: "I would say something to you as to the question whether it was known to Stevens, who subsequently became the grantee of this claim, and not to Moyer; but I think the evidence tends clearly to prove that it was known to Moyer if it was known to Stevens; therefore I shall not raise *my* distinction upon that point. Perhaps there might be a distinction presented, but I do not think it is important in this case. If you find that it was known to Stevens, I think you may find, upon the same evidence, that it was known to Moyer. If it was known to Moyer, then, of course, it matters not whether it was known to other people."

21. Because the Court erred in giving the following instruction: "I think that is all, gentlemen, that there is in the cause. I do not know that it is necessary to repeat it again that the plaintiff's title must prevail unless it appears to you from the evidence that there was a lode existing in the ground, and that Moyer knew it at the time of making his entry and obtaining his patent, and that a location had been made upon it *in a general way;* that there was a certificate made; that there was a discovery of mineral within the claims and that the lode was staked upon the surface and the like."

22. Because the Court erred in overruling the motion for a new trial made by plaintiff in error, and in the giving of judgment on the verdict of the jury.

## ARGUMENT.

The first five errors assigned relate to the admission of testimony by the Court below for the purpose of proving a knowledge of the existence of a lode within the placer.

1. Of the existence of lode claims in the *vicinity of or proximity* to the placer.

2. In the admission of testimony of lode claims not located or discovered prior to November 13th, 1878, the date of the application for patent to the placer and which were not shown or claimed to have been located or discovered *within* the boundaries of the placer.

3. In the admission of evidence as to the mere staking and location of lode claims in the *vicinity* of the placer without first compelling the foundation to be laid by proof of the discovery of a lode within such claims.

4. In admitting testimony as to the existence of veins or lodes within the boundaries of the placer based upon workings and

developments made since the date of application for the placer patent, to wit: the 13th day of November, 1878.

5. The admission of testimony as to divers conversations had with one W. H. Stevens, relative to the existence of veins without the boundaries of the placer and to the expression of ideas, theories, beliefs and intentions by said Stevens in regard to the existence of veins within the boundaries of the placer.

The case of the Iron Silver Mining Company vs. Reynolds, 124 U. S. 374, has practically decided that the proof of neither or all of the first four facts above mentioned in regard to which testimony was offered, would constitute knowledge of the existence of a lode required to bring such lode within the operation of the excepting clause in the placer patent. The Court in that case decides and so decided when the case was formerly before it (116 U. S. 687) that a vein or lode to come within the operation of such excepting clause must have been "known to exist within a placer claim at the time the application for the patent was made." Testimony therefore as to the existence of veins *without* the placer, not shown to have been known to exist at the date of application for the placer patent, could not certainly have the slightest bearing upon the knowledge of the existence of a lode *within* the placer at that date. Neither could the existence of lode claims within the placer boundaries not shown to have been located or discovered prior to the date of the application for a patent for the placer, have any bearing upon the question as to whether a lode was known to exist within the placer at and prior to that date. Still less could evidence as to the mere staking and location of lode *claims* in the vicinity of the placer have had any bearing upon that fact when no foundation was laid by proof of a discovery of a vein or lode within the claims, the existence of which, prior to the date of the placer application, was attempted to be proved, for the reason, that without the discovery of a lode there can, under no circumstances, be a valid claim and the discovery of a lode is a condition precedent to the existence of a valid lode mining claim.

Under the decisions of this Court in the cases last cited can it for a moment be contended that evidence based upon workings and developments made at any time since, let alone years after, the date of application for the placer patent, is proper and pertinent to prove the existence of a lode within the boundaries of the placer at the date of application for patent therefor?

The admission of any of the evidence classed under the first

four heads must have had an effect upon the jury largely prejudicial to plaintiff in error (defendant below) and such admission must certainly constitute error.

That the Court erred in admitting evidence of the conversations with one W. H. Stevens as to the intent, beliefs and theories of said Stevens, this Court has expressly decided.

Iron Silver Mining Co. vs. Reynolds, 124 U. S., 374.

In that case the same Court below instructed the jury:

"For if in any case it appear that an application for a patent is made with intent to acquire title to a lode or vein which may exist in the ground beneath the surface of the placer claim, it is believed a patent issued upon such application cannot operate to convey such lode or vein," (and further) "that intention could be formed only upon investigation as to the character of the ground and the belief as to the existence of a valuable lode therein, which would amount to knowledge under the statute."

This Court, commenting in that case upon that instruction, says:

"This instruction is plainly erroneous. The statute speaks of acquiring a patent with a knowledge of the existence of a vein or lode within the boundaries of the claim for which a patent is sought, not the effect of the intent of the party to acquire a lode which may or may not exist, of which he has no knowledge." (Again) "knowledge may be had without making hopes and beliefs on the subject its equivalent."

The evidence as to the intents, theories, ideas, hopes and beliefs of Stevens, taken in connection with the instructions of the Court, could have had no other effect upon the jury than to convince them that such ideas, theories, intentions, hopes and belief practically amounted to knowledge, and when in the instructions the Court below told the jury (20th assignment) "that if they believed the vein was known to Stevens it was equally known to Moyer," they could not do otherwise than conclude that as no other question of evidence with reference to Stevens' knowledge was before them than that given as to his ideas, intents, hopes, theories and beliefs, therefore such theories, etc., constituted knowledge in Stevens as to the existence of a lode which was within the exception of the patent as issued to Moyer.

The sixth assignment of error relied on by counsel is to the admission in evidence of the location certificate of the Goodell lode introduced by the defendant in error for the purpose of showing

title and in permitting title to be traced through deeds of conveyance from such location certificate.

A location of a mining claim to be a valid one must be made upon the public domain. The location certificate of the Goodell lode, introduced in evidence, bears record date of the 10th of March, 1879, just four months after the 13th day of November, 1878, when application for patent for the Moyer placer was made, and twenty days after the 21st day of February, 1879, when the placer was entered and paid for, and consequently a much longer time after the placer had been located.

The issuance of the patent of the placer is evidence against all the world, except in a direct proceeding by the Government to set it aside, that the William Moyer is and was a mining claim perfected under the law. This Court in the case of Noyes vs. Mantle, 127 U. S., 348, has said, "that a mining claim perfected under the law is property in the highest sense of that term which may be bought, sold and conveyed and will pass by descent." It is not, therefore, in whole or in part subject to the disposal of the Government.

Among the rights which pertain to a mining location (section 2322, U. S. Rev. Stat.) is the right to the exclusive possession and enjoyment of all the surface included within the lines of the location. The patent can convey no greater rights than are given by the statute authorizing the location and the acquisition of those rights, nor can a patent limit the rights acquired by a location. This right to the surface and to the exclusive possession of the surface and to all veins or lodes within the vertical boundaries as were known at the date of application for the placer patent, has been sustained by this Court in Iron Silver Mining Co. vs. Reynolds, 124 U. S., 374.

It is well settled that no valid title can be initiated through a trespass and that an entry upon premises in the actual possession of another, for the purpose of initiating a title, is a trespass.

Lebanon Mining Co. vs. Rep. Con. Mg. Co., 6 Colo., 371–380.
DuPrat vs. James, 65 Cal., 555.
Erhardt vs. Boaro, 113 U. S., 527.

If at the date of the location of the William Moyer placer, and at the date of application for patent therefor, and at the date of the entry and payment for the same, all of which dates ante-date

by long periods the date of the location of the Goodell lode, the owners of the placer were in possession and entitled to the exclusive possession of the surface, how could the attempted subsequent location of the Goodell lode have been made without a trespass upon the rights of plaintiff in error to that exclusive possession?

The sinking of the so-called discovery shaft, the staking of the claim, the surveying thereof, each and every separate act incident to the so-called location, necessitated a separate trespass upon the placer rights. Can it then be said that the location certificate of the Goodell lode, which was and is itself the crowning consummation and evidence of this series of trespasses, should of right be admitted in evidence to enable defendants in error to assert and maintain a title adverse to that of plaintiff in error?

It may or may not be that the Goodell lode was a lode known to exist at the date of application for the placer patent, but if it were, a location made upon it to be a valid one must have been made under a statute authorizing it. The title of the Government to its lands passes from it through its Executive Departments. These departments can convey it only when authorized so to do by statute.

Sec. 2318 R. S.: "In all cases lands valuable for minerals shall be reserved from sale except as otherwise expressly directed by law."

Sec. 2319 R. S.: "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Section 2318 is an express reservation from sale of all lands valuable for minerals.

Section 2319 is specific legislation directing what mineral deposits may be sold, and how and to whom the lands in which they are found shall be open to occupation and purchase.

In section 2319 is found the authority for the Executive Department of the Government to alienate the Government's title under certain regulations, and further laws govern the method of procedure under which such alienation can be consummated.

Admitting for the moment, that the Goodell lode was, at the

date of application for the placer patent, a lode known to exist within the boundaries of the placer and is thus brought within the excepting clause of the placer patent, is it, in the language of Sec. 2319, "a valuable mineral deposit *in lands belonging* to the United States," and are, or were the lands in which it was found, open to occupation and purchase at the date of the application for the placer patent?

It is a known lode and a known lode only which the statute and a placer patent excepts. The land in which it is found has been already conveyed by the placer patent which conveys the legal title.

In actions of ejectment the legal title must prevail against any title which may be set up which is not a legal one.

The sixth assignment relied on is the error of the Court in admitting in evidence the location certificate of the Goodell lode, introduced by the defendant in error for the purpose of showing title, and in admitting the introduction of the several deeds of conveyance through which defendant in error traces its title from said location certificate.

That the location of the Goodell lode could not have been lawfully made upon lands the title to which had *already* passed from the government and which were in the actual possession of another, is therefore self-evident. The location certificate of that lode, showing as it does on its face that the lode was not located until three months after the date of application for the placer patent, could then under the circumstances constitute no proof of a title from which defendants in error could legally deraign as a defense in this action, and neither it nor the deeds purporting to convey title from it should have been admitted in evidence for the purpose of proving title. The admission in evidence on the part of defendant in error of the location certificate of the Goodell claim for the purpose of proving title, was an error clearly tending to impress upon the jury the fact that defendants in error had some legal standing before the Court which was in itself of efficacy as proof against the patent.

The seventh assignment relied on is the refusal to instruct the jury that the plaintiff had shown title in fee to the land in controversy by United States patent therefor and by deeds of conveyance by patentee and his grantees, and that the date of the plaintiff's title in fee relates to the date when application was made for the placer patent, which was shown by the certificate of the Register and Receiver to be the 13th day of November, 1879.

This instruction was proper, and should have been given, even

if qualified by excepting lodes known to exist at the date of the application for the placer patent. Instead of such an instruction the Court gave the following:

"If there was a lode in that territory and it was known to Moyer as an existing lode at this time, and by this time I mean the 1st of February, 1879 (two and a half months after the date of application for the placer patent), or at the time these locations were said to have been made, and the lode had previously been discovered by the locators of these claims, then the placer patent is not sufficient to convey them."

There is no doubt under the decisions of this Court as to the date at and prior to which the lode must be known to exist, and to refuse to instruct as to that date is certainly error.

Another assignment of error is the refusal of the Court below to instruct the jury.

"That to enable defendant to establish and prove any title or right to the possession of a lode mining claim within the exterior boundaries of a patented placer claim, they must prove and show that there is found within the exterior boundaries of such lode claim the top, out-crop or apex of a lode or vein of quartz or other rock in place bearing gold, silver or other valuable deposits."

Counsel believes that the theory upon which the mining law is drawn is that all lode claims will be naturally located upon the apex or out-crop of a lode, for the reason that that part of the lode is the part which is found nearest the surface or protrudes from it, and is necessarily the part of the lode by which it will ordinarily be discovered. It is only the possession of this apex or out-crop which confers upon the lode claimant the right to follow the vein indefinitely into the earth within certain boundaries. Without possession of an apex a claimant under a lode location acquires no right to a vein which he may discover, by virtue of which he can eject any intruder upon that vein, or by which he can defend against the owner of the apex of the same vein should the apex thereof be found to lie without his boundary lines.

Iron Silver Co. vs. Cheesman, 116 U. S., 530.

It would then appear that without the possession of the apex or out-crop of a vein, no rights, which he can legally enforce, can accrue to a locator under a lode location so long as such a location has not ripened into an entry or patent. In order then to establish the right to possession of a lode mining claim and the

validity of its location, it is essential to show that the discovery of a lode has been made as contemplated by the law.

The discussion of the questions presented by the eleventh, twelfth and thirteenth assignments relied on is included in the arguments presented on the sixth assignment.

That the Court below erred in giving each and all of the instructions set forth in the fourteenth, fifteenth, sixteenth, seventeenth and eighteenth assignments relied on, is self-evident, because, in all of those instructions, the jury were told that if, at the *date of the issuance of the patent*, there was a lode known to exist within the placer, then that lode was excepted from the operation of the placer patent. This Court has already decided,

> Reynolds vs. Iron Silver Mining Co., 116 U. S., 687;
> Iron Silver Mining Co. vs. Reynolds, 124 U. S., 374;

that the date at which the knowledge must exist is the date of the *application* for the patent, and not the date of its *issuance*. The injustice of those instructions is most apparent, when it is considered that the evidence (Record 26) shows the date of the issuance of the patent to have been January 30th, A. D. 1880, and (Record 22) the date of application for patent November 13th, A. D. 1878. In the instruction quoted in the seventeenth assignment in this brief, the Court definitely fixed the date, to wit, February 1st, 1879, at which knowledge, on Moyer's part, would operate to defeat the patent, as far as it affects the lode known to exist, the Court evidently selecting that date because it was the date inserted by the locators of the Goodell lode themselves in their location certificate. (Record 29.) The locators might have inserted any date, and probable did insert a date, prior to the authentic date of its record, that would, in their opinion, serve to bring them within the exceptions of the placer patent.

In the instruction quoted in the nineteenth assignment in this brief, the Court, in effect, told the jury that it was not necessary that the location under which defendants in error claim should have been a valid one, when made, but that it was sufficient if, at any time thereafter, it should be made good, because the contest was not between two lode locations, but between a lode claim and a placer; that any visible and open so-called lode location upon the surface was, and is, good as against a placer claim, but would not be good as against other lode locations, thus creating in the

minds of the jury the impression that a peculiar sanctity attached to a lode location as against a placer, whether the lode location were valid or not. However thoroughly the Court below may be convinced concerning that sanctity, such a conviction does not change the law, as laid down to the contrary in a long line of decisions, in which this Court has reversed the same lower Court.

The twentieth assignment of error in this brief, quotes an instruction given on the subject of Moyer's knowledge of the existence of some lode, which is vaguely referred to but no where particularized throughout all the instructions given. As far as the instructions go, the lode referred to in them may be any lode in or under the placer, concerning which testimony was given. The frame of mind of the Court during the trial of the case is evidenced by the remarks of the Court to counsel (Record 32 and 33) which, together with the reply of counsel, were as follows :

"The Court: The defendant can put in evidence all he wishes as to the existence of a lode, and the knowledge of the patentee of it, with a view to make his record. If he can prove any other lodes tending to prove this one, that is to say, the purpose would be incorrect in general, but we all understand very well the theory in respect to this ground is, there is one lode going all through, so if he offers testimony to show that there are other lodes around there it tends to prove the existence of this lode.

"Counsel: Anything which is not a discovery and which they claim, they certainly have no right to attempt to prove, and they have no rights if they have no discovery; they must first prove a discovery before they can establish the existence of a claim.

"The Court: Well, sir, the theory upon which they proceed is that you never got this lode, being known to you. Whether they made a valid location of it or not is another question, but if it was known to the patentee at the time of the entry, whether located or not, their position is, and they are going to maintain in the Supreme Court, if they can, that you never got title to it by means of your placer patent."

In the remarks quoted, the Court virtually states that a theory *exists* in regard to the Moyer placer, which theory is, that "there is one lode going all through" the Moyer placer, and that defendants would not consequently be confined to proving the knowledge of the existence of the so-called vein exposed in the tunnel which crosses the Goodell and Gardiner locations, but might prove the existence of other veins in the vicinity, which proof would, in the opinion of the Court, "tend to prove the existence of this lode," which, in theory, "goes all through" the placer. Having thus in the beginning of the case pointed out the logical

and conclusive manner in which the existence of a lode, supposed to be the said theoretical lode, might be proved, the Court proceeded to outline and define defendants' position, and stated that what defendants "are going to maintain in the Supreme Court if they can" is, that plaintiff in error "never got title to that (theoretical) lode by means of the placer patent." It was upon this theory, and in this view of the case that the Court gave its instructions, and for that reason the instructions are so vague and indefinite, where the lode, which it is contended was known to exist, is mentioned in them. Counsel for defendants in error, (defendants below) naturally taking their cue from the Court, adopted the theory so said to exist, and conducted the case accordingly. The probabilities, however, are, as evidenced by the records in Reynolds vs. Iron Silver Mining Company (*supra*) and Iron Silver Mining Company vs. Campbell, *et al.*, now pending before this Court, numbered 222 on the docket of October term, 1888, and in which cases the same counsel appeared, that the only hope defendants had of proving knowledge in the patentee or any other person, of the existence of any lode or vein, was through evidence of developments made since 1878 at remote distances from the ground in controversy, upon veins or lodes, which defendants now assert are part of this same theoretical blanket lode which, it is said, "goes through" the whole country. The knowledge of the existence of this theoretical lode "going all through the ground" being conclusively (?) shown by the kind of evidence, the admission of which the Court itself acknowledged "would be incorrect in general," but asserted, would tend to prove the *existence* of that lode (a point not in issue, the question being one of knowledge), it was not difficult to arrive at the logical (?) conclusion that *knowledge* of the existence of a part is *knowledge* of the existence of the whole.

On such evidence and by such logic, a savage, gazing at a piece of meteoric iron, could be convicted of a knowledge of the exististence of the star of which it originally formed part.

If the defendants in error can be understood as contending for any one thing in the case before us, it may be imagined that they have striven to show that the Goodell and Gardiner locations are located upon veins which were known to exist by the patentee of the William Moyer at a time which would bring those veins within the exceptions of the placer patent.

The first evidence introduced was the deposition of George

Leonhardy (Record 33) who was, in spite of objections, asked, and permitted to answer a number of irrelevant questions about veins in the vicinity of the Moyer placer, and developments upon them. Not one question was asked him as to the territory embraced in the Goodell and Gardiner locations, or the developments claimed to have been made thereon. The only questions put to him at all bearing on the subject, were vague and indefinite (Record 37), the answers do not even tend to establish knowledge in the placer patentee of even the "vein or deposit of mineral ore *underneath*" the placer, mentioned in the leading questions put. It is said in one answer on that page that "wherever they sunk there they found mineral, you might say," but no place is mentioned where sinking was done on the Moyer placer. The remainder of Leonhardy's evidence relates to conversations had with Stevens regarding his (Stevens') geological theories and beliefs, which this Court has already decided to be incompetent.

Iron Silver Co. vs. Reynolds 124 U. S. 374.

The next witness was C. C. Baldwin (Record 41), who testifies that all the knowledge he had of the existence of any vein in the workings on the Goodell and Gardiner locations was acquired some thirty days before the giving of his testimony (Nov. 16th, 1885), although he had surveyed the Wells & Moyer placer adjoining the Moyer, in 1877, and had been "familiar" with both placers since that time, and states that the general understanding at that time was, that a vein was supposed to exist *under* the Moyer placer.

Michael Norris, the next witness (Record 44) testifies also, that he first knew the so-called veins in the tunnel crossing the Goodell and Gardiner claims "three or four weeks" before giving his testimony. Although he had lived in the vicinity since 1867 and himself, was the discoverer and locator of the Mike lode, which adjoins the Goodell and Gardner, he had never known of any vein or lode being discovered on the Moyer placer prior to the time he went into the tunnel in 1885.

John Hayes, one of the locators of the Goodell and Gardiner lodes, testified (Record 50), that he had helped to run the Mike tunnel 550 feet; that the intent and purpose of the tunnel was to intersect the Mike vein, which lies without the placer, and concerning which Norris testified; that in the tunnel they cut something which he dignifies by the name of veins, and which carried

gold, not lead and silver, as the contact vein of Leadville does, and as the veins before testified about do; that the walls of the so-called veins are porphyry (not lime and porphyry such as are supposed to characterize the theoretical vein spoken of); that they did not stop to locate the so-called veins, because they did not have money to locate veins then, although they had means to run the tunnel 400 feet; *that they closed and covered the mouth of the tunnel* (p. 57); that he did not remember that he told any of his friends when he cut the so-called veins, and as far as he remembered but one man aside from those interested with him (a Mr. Reeves) was ever in the tunnel.

The next and last witness was F. G. Bulkley (Record 61), who testified that he is by profession a civil and mining engineer; that he made the maps used; that at 78 feet from the mouth of the tunnel, and on the Gardiner claim, is found a crevice (called by the others a vein), having porphyry walls and a dip of 60°, and being filled "with a mixed mass of iron stained porphyry and clay"; that he is convinced that the crevice is a fault plane where the rock, by a geological movement, has broken, and one part has fallen and slid against the other; that at a distance of 156 feet from the mouth of the tunnel a gray porphyry is cut lying next to the white, making a contact of two different rocks, and which contains a streak or band of irony material, and that 278 feet from the mouth, the wash which covers the hill is again found in the tunnel; that *developments have shown* that the Moyer placer is underlaid by a contact vein (presumably the theoretical lode) which has a dip of six to fifteen degrees from the horizontal (certainly neither of the veins described as being cut in the tunnel). On cross-examination he said that he did not describe the crevice as a vein; that he has testified twenty-five or fifty times concerning the contact vein in Iron Hill, which presumably extends under the Moyer placer, and the apex of which lies outside that placer wherever it is, and upon other property belonging to plaintiff; that he was not prepared to say whether the crevice or seam was a vein or not or whether it connected with the contact vein or not. A glance at his small, square drawing in the left hand corner of the map containing the vertical section will show better than words why Mr. Bulkley did not call the crevice a vein.

The conclusion is irresistible that the intention of defendants is, if possible, to show that the so-called Goodell and Gardiner

lodes fall within the exceptions of the placer patent and thus to carve out for themselves a segment of this underlying vein which they never discovered and never saw within the boundaries of the Moyer placer, by proving, not knowledge of the existence of their so-called lodes, but knowledge of the existence of another lode which only presumably and theoretically underlies their claims and which they do not claim by right of discovery or location.

In regard to the twentieth assignment: The principle that the knowledge of Stevens was the knowledge of Moyer, is certainly unique when it is not invoked by a party interested asserting a relation of trust and confidence with either or between them. It is still more so when the only proof of Stevens' knowledge was evidence of conversations had with him concerning his theories and beliefs, which this Court has decided do not constitute knowledge. If such theories and beliefs do not constitute knowledge even in Stevens, how can they be said to do so in Moyer? Further comment on the instruction excepted to is unnecessary.

The judgment in this case is not supported by the evidence for the reason that the only legitimate object of the evidence was or could have been to establish the fact that the Goodell and Gardiner were lodes known to exist *within* the boundaries of the William Moyer placer at the date of the application for patent for the placer. This the evidence utterly and entirely fails to do.

This case, together with one of similar title, and numbered 232 upon the docket of this Court for the October term, 1888, were tried simultaneously upon the same evidence. This case is the adverse suit against defendants' application for patent for the Goodell lode, number 232, being the adverse suit against their application for patent to the Gardiner lode. The only difference in the transcripts of the record in the two cases is, that the name of the Goodell claim appears in the transcript in number 231, and that of the Gardiner in number 232. Both location certificates bear the same date and, except for the names of the lodes, each transcript is otherwise an exact copy of the other.

Counsel therefore asks that copies of this brief, which will be filed in number 232, may be considered as applicable to that case.

For the reasons stated herein, counsel contends that the decision of the Court below should be reversed, and a new trial awarded.

Most respectfully submitted,

FRANK W. OWERS,

Dec. 31, 1888.

*Of Counsel for Plaintiff in Error.*

# In the Supreme Court

## Of the United States.

OCTOBER TERM, A. D. 1888.

THE IRON SILVER MINING COMPANY,
Plaintiff in Error,
vs.
THE MIKE AND STARR GOLD AND SILVER MINING COMPANY,
Defendant in Error.

No. 232.

Error to the Circuit Court of the United States for the District of Colorado.

## BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

FRANK W. OWERS,
*Of Counsel for Plaintiff in Error.*

PIERSON & WILLIAMS, LEGAL PRINTERS, DENVER, COLO.

# In the Supreme Court

## Of the United States.

OCTOBER TERM, A. D. 1888.

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| THE IRON SILVER MINING COMPANY, Plaintiff in Error, vs. THE MIKE AND STARR GOLD AND SILVER MINING COMPANY, Defendant in Error. | No. 232. Error to the Circuit Court of the United States for the District of Colorado. |

## BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

### STATEMENT OF THE CASE.

On the 10th day of July, 1878, William Moyer and three others located a portion of the public mineral domain of the United States as a placer, calling same the William Moyer placer.

On November 13th, 1878, Moyer applied for a patent for the ground located, and on the 21st of February, 1879, entered and paid for the land, and received a Receiver's receipt therefor, and thereafter, on the 30th day of January, 1880, a United States patent was issued to him for the ground so located, comprising 56 69-100 acres, more or less, (record, page 19), which patent contains the following exception or reservation: "That should any vein or lode of quartz, or other rock in place-bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, be claimed

or known to exist within the above-described premises at the date hereof, the same is expressly excepted and excluded from these presents."

The plaintiff in error, subsequently and prior to this suit, by various deeds of conveyance, became the grantee of the locators and patentee of the placer.

On the 11th day of March, 1879, Maurice Hayes and others filed with the County Clerk and Recorder of Lake County, Colorado, a location certificate of the Goodell lode claim. (Record, 29.) The premises described in said certificate lie wholly within the boundaries of the said Moyer placer. The certificate recites, among other things, that the Goodell lode was located on the 1st day of February, 1879, or three months after the date of the application for the patent to the William Moyer placer. Subsequently, and on the 13th day of April, 1881, the defendant in error made application in the United States Land Office at Leadville to be allowed to enter and pay for the said Goodell lode. To this application plaintiff in error filed in the U. S. Land Office at Leadville, Colorado, a protest, setting forth that the land for which claimants of the Goodell lode sought to obtain a patent, was already patented as the William Moyer placer. This protest was sustained by the Interior Department (Copp's Land Owner, Vol. 10, p. 150), but permission was given to re-apply for a patent for a strip 25 feet in width on either side of the Goodell lode. This new application was made December 11th, 1885. Thereupon the plaintiff in error, fearing that a failure so to do might jeopardize some of its legal rights, filed in said land office, within the time provided by law under the provision of section 2325 of the Revised Statutes of the United States, an adverse claim against said new application for patent, and this suit was brought by plaintiff in error in support of the said adverse claim, in pursuance of the United States statute in such case made and provided.

This is an action of ejectment brought under the provisions of said Section 2325 of the Revised Statutes, which, while being formally to recover the possession of that portion of the premises described in the patent to the William Moyer placer, which is described in the location certificate of said Goodell lode, and in the application for patent therefor, is really in effect, a suit to prevent the issuance of a patent by the United States Land Office to the Goodell lode, and defendants, to legally recover, must have

proved their case affirmatively, and to have recovered or successfully defended must have shown a valid location.

Bay State Co. vs. Brown, 21 Fed Rep., 167.
Jackson vs. Roby, 109 U. S., 440.
McGinnis vs. Egbert, 8 Colo., 41.
Rosenthal vs. Ives, 12 Pac. Rep., 904.

Complaint was filed on the 20th day of February, A. D. 1885, by the plaintiff in error, alleging an ouster by defendant in error of possession of plaintiff in error of the William Moyer placer, the fee simple title to which plaintiff in error claimed to hold by virtue of United States patent therefor.

On the 22d day of April, 1885, defendant in error filed its answer denying the allegations of the complaint and setting up four defenses to the action. The first is a general denial. The second being an allegation that at the time of the location of the said Moyer placer claim, and the certificate thereto, and at the time of application for patent therefor, and at the time of the entry of said placer, and at the time of the issuance and grant of said patent, a lode, vein or deposit of mineral, of quartz and other rock in place carrying carbonates of lead and silver, was known to exist and was claimed within the boundaries of the said William Moyer placer (Survey 300), and the fact that said vein was claimed and did exist within the said premises, was known to the patentee of said placer at all the times before mentioned. The third is a claim to the title of the premises described in the location certificate of the Goodell lode on the ground that the vein so known and claimed to exist was known and claimed as the Goodell lode, and the fourth is a claim to the title to certain premises in the answer described and called the Mike lode.

To this answer a replication was filed on the 15th day of October, A. D., 1885, which denies the allegations of the answer, except that it admits the pretended location of the Goodell lode within the placer; denies that such location could be legally made, and avers that no top, outcrop or apex or any part of any vein or lode has ever been discovered or exposed by defendants in error or their grantors or their predecessors in interest, within the boundaries of said patented lode claim, or within the boundaries of the William Moyer placer. The case is before this court on writ of error sued out December 5th, 1885.

The evidence introduced on behalf of the plaintiff in error, was, with the exception of the testimony of F. T. Freeland, intro-

duced for the purpose of identification of maps, purely documentary, and consisted of its chain of title, the patent of the United States for the William Moyer placer, the certificate of the Register of the United States Land Office, Leadville, Colorado, as to the date of the application for patent for the placer and a certified copy of the location certificate of the Goodell lode claim, said location certificate being introduced as stated at the trial (record 29) for the sole and only purpose of fixing the date of the pretended location of that lode claim.

## Assignment of Errors.

Among the errors assigned by the plaintiff in error and which are relied upon by it, are errors committed by the Court below in admitting and refusing to admit certain evidence, and in refusing to give certain instructions asked for by plaintiff in error, and in the giving of certain other instructions and in rendering its judgment, and are here set forth.

1. Because the Court erred in admitting evidence as to the existence of lode claims in the vicinity of, or in proximity to, the William Moyer placer, for the purpose of proving a knowledge of the existence of lodes within the placer.

2. Because the Court erred in admitting evidence as to the existence of lode claims not located or discovered prior to November 13th, 1878, when the patent for the Moyer placer was applied for, and not shown to have been located or discovered within the boundaries of the William Moyer placer.

3. Because the Court erred in admitting evidence as to the mere staking and location of lode claims in the vicinity of the William Moyer placer without first compelling the foundation to to be laid by proof of the discovery of a lode within the boundaries of the claims, the staking and location of which was sought to be established.

4. Because the Court erred in admitting evidence as to the existence of veins or lodes within the boundaries of the William Moyer placer, based upon the workings and developments made since the date of the application for the patent to the placer, to wit: 13th day of November, 1878.

5. Because the Court erred in admitting evidence of conversations had with one W. H. Stevens relative to the existence of veins without the boundaries of the placer and relative to the expression of ideas, theories, beliefs and intentions by said Stevens in regard to the existence of veins within the boundaries of the placer.

6. Because the Court erred in admitting in evidence the location certificate of the Goodell lode, introduced by the defendant in error for the purpose of showing title, and in admitting the in-

troduction of the several deeds of conveyance through which defendant in error traces its title from said location certificate.

7. Because the Court erred in refusing to instruct the jury that the plaintiff had shown title in fee to the land in controversy by United States patent therefor and by deeds of conveyance from patentee and his grantees, and that the date of the plaintiff's title in fee relates to the time when application was made for the placer patent, which was shown by the certificate of the Register and Receiver, to be the 13th day of November, 1879.

8. Because the Court erred in refusing to instruct the jury "that if they (the jury) believed from the evidence that the application was made for the said William Moyer placer patent before the time when the said defendant went upon the said ground or any part thereof, and attempted to discover and locate a lode mining claim by sinking a shaft, making a location and recording a certificate of location of said claim, then they will find for the plaintiff."

9. Because the Court erred in refusing to give to the jury the sixth instruction asked for by plaintiff in error, as follows: "The jury are instructed that to enable the defendant to show or prove any title or right to possession to a lode claim within the boundaries of the said patented placer claim for the purpose of having such lode claim excepted from the grant of the placer patent, or brought within the reservation clause in the patent, it must show that it discovered, located and recorded such lode claim in accordance with the statutes of the United States and the State of Colorado, and was the owner and held possessory and pre-emption title to the same before the date of the application for the placer patent."

10. Because the Court erred in refusing to give to the jury the tenth instruction asked for by the plaintiff in error, as follows: "To enable parties to establish and prove a title or the right to possession to a lode mining claim within the exterior boundaries of a patented placer claim, they must prove and show that there is found within the exterior boundaries of such lode claim the top, outcrop or apex of a lode or vein of quartz or other rock in place bearing gold, silver, cinnabar, or other valuable deposits."

11. Because the Court erred in refusing to give to the jury the eleventh instruction asked for by the plaintiff in error, as follows: "The jury are instructed that any person or persons going upon or within the boundaries of a patented placer mining claim and attempting to discover or locate a lode mining claim thereon, become trespassers, and can acquire no title or right to possession by such acts."

12. Because the Court erred in refusing to give to the jury the twelfth instruction asked for by the plaintiff in error, as follows: "The jury are instructed that a lode claim located or attempted to be located within the exterior boundaries of a placer claim at any time after the time of making the application for

patent to the placer claim gives no right or title; any *claim* so located is not reserved from the grant of the placer patent."

13. Because the Court erred in refusing to give to the jury the sixteenth instruction asked for by plaintiff in error, as follows: "The Court instructs the jury that the locator of a mining claim, such as (the) William Moyer placer, has, after his location, the exclusive right of possession and enjoyment of all the surface included within the lines of his location and that any entry made upon such location for the purpose of initiating an adverse title to that of the locator is a trespass, and such title so initiated is absolutely and entirely void and of no effect."

14. Because the Court erred in giving the following instruction: "The patent shown by plaintiff must prevail in these suits, unless it has been shown, on the part of the defendant, that there was a vein or lode in the territory covered by these locations, which are called the Goodell and Gardiner, at the time of the issuance of the patent."

15. Because the Court erred in giving the following instruction: "There must have been a vein or lode in that territory known to the patentee, William Moyer, and there must have been locations made upon it as described in the pleadings and maps which have been put before you."

16. Because the Court erred in giving the following instruction: "The evidence tends to prove that the discovery of mineral in these claims was made in a tunnel sometime in 1877, I believe; the locations were not made on the surface of the ground until 1879, about the first of February. That was after the application for patent and before the entry, which was about the 21st of February, 1879, and, of course, before the patent was issued."

17. Because the Court erred in giving the following instruction: "If there was a lode in that territory, and it was known to Moyer as an existing lode at this time, and by this time I mean the 1st of February, 1879, or at the time these locations were said to have been made, and the lode had previously been discovered by the locators of these claims, then the placer patent is not sufficient to convey them. In other words, they are excepted, by the terms of this statute, from the provisions of the patent, and the owners of that title now have no right to them."

18. Because the Court erred in giving the following instruction: "So that the question for your consideration is of that character whether, prior to the date of these alleged locations, which was in the early part of February, 1879, a lode was known to exist, or that Moyer knew of it at that time, and that locations were made upon it."

19. Because the Court erred in giving the following instruction: "It has been said by counsel that if the lode had not been discovered in the discovery shafts, that would defeat defendants' title and make good that of the plaintiff; but that is not true. It was not necessary that it should be a location upon which the

plaintiff could have resisted the claims of parties who were claiming under lode locations. It was enough if it was a visible and open location upon the surface, one which might be made good thereafter, if not then good, and a lode was known to exist, known to Moyer. When the statute speaks of its being known, it means known to the patentee."

20. Because the Court erred in giving the following instruction: "I would say something to you as to the question whether it was known to Stevens, who subsequently became the grantee of this claim, and not to Moyer; but I think the evidence tends clearly to prove that it was known to Moyer if it was known to Stevens; therefore I shall not raise *my* distinction upon that point. Perhaps there might be a distinction presented, but I do not think it is important in this case. If you find that it was known to Stevens, I think you may find, upon the same evidence, that it was known to Moyer. If it was known to Moyer, then, of course, it matters not whether it was known to other people."

21. Because the Court erred in giving the following instruction: "I think that is all, gentlemen, that there is in the cause. I do not know that it is necessary to repeat it again that the plaintiff's title must prevail unless it appears to you from the evidence that there was a lode existing in the ground, and that Moyer knew it at the time of making his entry and obtaining his patent, and that a location had been made upon it *in a general way;* that there was a certificate made; that there was a discovery of mineral within the claims and that the lode was staked upon the surface and the like."

22. Because the Court erred in overruling the motion for a new trial made by plaintiff in error, and in the giving of judgment on the verdict of the jury.

## ARGUMENT.

The first five errors assigned relate to the admission of testimony by the Court below for the purpose of proving a knowledge of the existence of a lode within the placer.

1. Of the existence of lode claims in the *vicinity of or proximity* to the placer.

2. In the admission of testimony of lode claims not located or discovered prior to November 13th, 1878, the date of the application for patent to the placer and which were not shown or claimed to have been located or discovered *within* the boundaries of the placer.

3. In the admission of evidence as to the mere staking and location of lode claims in the *vicinity* of the placer without first compelling the foundation to be laid by proof of the discovery of a lode within such claims.

4. In admitting testimony as to the existence of veins or lodes within the boundaries of the placer based upon workings and

developments made since the date of application for the placer patent, to wit: the 13th day of November, 1878.

5. The admission of testimony as to divers conversations had with one W. H. Stevens, relative to the existence of veins without the boundaries of the placer and to the expression of ideas, theories, beliefs and intentions by said Stevens in regard to the existence of veins within the boundaries of the placer.

The case of the Iron Silver Mining Company vs. Reynolds, 124 U. S. 374, has practically decided that the proof of neither or all of the first four facts above mentioned in regard to which testimony was offered, would constitute knowledge of the existence of a lode required to bring such lode within the operation of the excepting clause in the placer patent. The Court in that case decides and so decided when the case was formerly before it (116 U. S. 687) that a vein or lode to come within the operation of such excepting clause must have been "known to exist within a placer claim at the time the application for the patent was made." Testimony therefore as to the existence of veins *without* the placer, not shown to have been known to exist at the date of application for the placer patent, could not certainly have the slightest bearing upon the knowledge of the existence of a lode *within* the placer at that date. Neither could the existence of lode claims within the placer boundaries not shown to have been located or discovered prior to the date of the application for a patent for the placer, have any bearing upon the question as to whether a lode was known to exist within the placer at and prior to that date. Still less could evidence as to the mere staking and location of lode *claims* in the vicinity of the placer have had any bearing upon that fact when no foundation was laid by proof of a discovery of a vein or lode within the claims, the existence of which, prior to the date of the placer application, was attempted to be proved, for the reason, that without the discovery of a lode there can, under no circumstances, be a valid claim and the discovery of a lode is a condition precedent to the existence of a valid lode mining claim.

Under the decisions of this Court in the cases last cited can it for a moment be contended that evidence based upon workings and developments made at any time since, let alone years after, the date of application for the placer patent, is proper and pertinent to prove the existence of a lode within the boundaries of the placer at the date of application for patent therefor?

The admission of any of the evidence classed under the first

four heads must have had an effect upon the jury largely prejudicial to plaintiff in error (defendant below) and such admission must certainly constitute error.

That the Court erred in admitting evidence of the conversations with one W. H. Stevens as to the intent, beliefs and theories of said Stevens, this Court has expressly decided.

Iron Silver Mining Co. vs. Reynolds, 124 U. S., 374.

In that case the same Court below instructed the jury:

"For if in any case it appear that an application for a patent is made with intent to acquire title to a lode or vein which may exist in the ground beneath the surface of the placer claim, it is believed a patent issued upon such application cannot operate to convey such lode or vein," (and further) "that intention could be formed only upon investigation as to the character of the ground and the belief as to the existence of a valuable lode therein, which would amount to knowledge under the statute."

This Court, commenting in that case upon that instruction, says:

"This instruction is plainly erroneous. The statute speaks of acquiring a patent with a knowledge of the existence of a vein or lode within the boundaries of the claim for which a patent is sought, not the effect of the intent of the party to acquire a lode which may or may not exist, of which he has no knowledge." (Again) "knowledge may be had without making hopes and beliefs on the subject its equivalent."

The evidence as to the intents, theories, ideas, hopes and beliefs of Stevens, taken in connection with the instructions of the Court, could have had no other effect upon the jury than to convince them that such ideas, theories, intentions, hopes and belief practically amounted to knowledge, and when in the instructions the Court below told the jury (20th assignment) "that if they believed the vein was known to Stevens it was equally known to Moyer," they could not do otherwise than conclude that as no other question of evidence with reference to Stevens' knowledge was before them than that given as to his ideas, intents, hopes, theories and beliefs, therefore such theories, etc., constituted knowledge in Stevens as to the existence of a lode which was within the exception of the patent as issued to Moyer.

The sixth assignment of error relied on by counsel is to the admission in evidence of the location certificate of the Goodell lode introduced by the defendant in error for the purpose of showing

title and in permitting title to be traced through deeds of conveyance from such location certificate.

A location of a mining claim to be a valid one must be made upon the public domain. The location certificate of the Goodell lode, introduced in evidence, bears record date of the 10th of March, 1879, just four months after the 13th day of November, 1878, when application for patent for the Moyer placer was made, and twenty days after the 21st day of February, 1879, when the placer was entered and paid for, and consequently a much longer time after the placer had been located.

The issuance of the patent of the placer is evidence against all the world, except in a direct proceeding by the Government to set it aside, that the William Moyer is and was a mining claim perfected under the law. This Court in the case of Noyes vs. Mantle, 127 U. S., 348, has said, "that a mining claim perfected under the law is property in the highest sense of that term which may be bought, sold and conveyed and will pass by descent." It is not, therefore, in whole or in part subject to the disposal of the Government.

Among the rights which pertain to a mining location (section 2322, U. S. Rev. Stat.) is the right to the exclusive possession and enjoyment of all the surface included within the lines of the location. The patent can convey no greater rights than are given by the statute authorizing the location and the acquisition of those rights, nor can a patent limit the rights acquired by a location. This right to the surface and to the exclusive possession of the surface and to all veins or lodes within the vertical boundaries as were known at the date of application for the placer patent, has been sustained by this Court in Iron Silver Mining Co. vs. Reynolds, 124 U. S., 374.

It is well settled that no valid title can be initiated through a trespass and that an entry upon premises in the actual possession of another, for the purpose of initiating a title, is a trespass.

Lebanon Mining Co. vs. Rep. Con. Mg. Co., 6 Colo., 371–380.
DuPrat vs. James, 65 Cal., 555.
Erhardt vs. Boaro, 113 U. S., 527.

If at the date of the location of the William Moyer placer, and at the date of application for patent therefor, and at the date of the entry and payment for the same, all of which dates ante-date

by long periods the date of the location of the Goodell lode, the owners of the placer were in possession and entitled to the exclusive possession of the surface, how could the attempted subsequent location of the Goodell lode have been made without a trespass upon the rights of plaintiff in error to that exclusive possession?

The sinking of the so-called discovery shaft, the staking of the claim, the surveying thereof, each and every separate act incident to the so-called location, necessitated a separate trespass upon the placer rights. Can it then be said that the location certificate of the Goodell lode, which was and is itself the crowning consummation and evidence of this series of trespasses, should of right be admitted in evidence to enable defendants in error to assert and maintain a title adverse to that of plaintiff in error?

It may or may not be that the Goodell lode was a lode known to exist at the date of application for the placer patent, but if it were, a location made upon it to be a valid one must have been made under a statute authorizing it. The title of the Government to its lands passes from it through its Executive Departments. These departments can convey it only when authorized so to do by statute.

Sec. 2318 R. S.: "In all cases lands valuable for minerals shall be reserved from sale except as otherwise expressly directed by law."

Sec. 2319 R. S.: "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Section 2318 is an express reservation from sale of all lands valuable for minerals.

Section 2319 is specific legislation directing what mineral deposits may be sold, and how and to whom the lands in which they are found shall be open to occupation and purchase.

In section 2319 is found the authority for the Executive Department of the Government to alienate the Government's title under certain regulations, and further laws govern the method of procedure under which such alienation can be consummated.

Admitting for the moment, that the Goodell lode was, at the

date of application for the placer patent, a lode known to exist within the boundaries of the placer and is thus brought within the excepting clause of the placer patent, is it, in the language of Sec. 2319, "a valuable mineral deposit *in lands belonging* to the United States," and are, or were the lands in which it was found, open to occupation and purchase at the date of the application for the placer patent?

It is a known lode and a known lode only which the statute and a placer patent excepts. The land in which it is found has been already conveyed by the placer patent which conveys the legal title.

In actions of ejectment the legal title must prevail against any title which may be set up which is not a legal one.

The sixth assignment relied on is the error of the Court in admitting in evidence the location certificate of the Goodell lode, introduced by the defendant in error for the purpose of showing title, and in admitting the introduction of the several deeds of conveyance through which defendant in error traces its title from said location certificate.

That the location of the Goodell lode could not have been lawfully made upon lands the title to which had *already* passed from the government and which were in the actual possession of another, is therefore self-evident. The location certificate of that lode, showing as it does on its face that the lode was not located until three months after the date of application for the placer patent, could then under the circumstances constitute no proof of a title from which defendants in error could legally deraign as a defense in this action, and neither it nor the deeds purporting to convey title from it should have been admitted in evidence for the purpose of proving title. The admission in evidence on the part of defendant in error of the location certificate of the Goodell claim for the purpose of proving title, was an error clearly tending to impress upon the jury the fact that defendants in error had some legal standing before the Court which was in itself of efficacy as proof against the patent.

The seventh assignment relied on is the refusal to instruct the jury that the plaintiff had shown title in fee to the land in controversy by United States patent therefor and by deeds of conveyance by patentee and his grantees, and that the date of the plaintiff's title in fee relates to the date when application was made for the placer patent, which was shown by the certificate of the Register and Receiver to be the 13th day of November, 1879.

This instruction was proper, and should have been given, even

if qualified by excepting lodes known to exist at the date of the application for the placer patent. Instead of such an instruction the Court gave the following:

"If there was a lode in that territory and it was known to Moyer as an existing lode at this time, and by this time I mean the 1st of February, 1879 (two and a half months after the date of application for the placer patent), or at the time these locations were said to have been made, and the lode had previously been discovered by the locators of these claims, then the placer patent is not sufficient to convey them."

There is no doubt under the decisions of this Court as to the date at and prior to which the lode must be known to exist, and to refuse to instruct as to that date is certainly error.

Another assignment of error is the refusal of the Court below to instruct the jury.

"That to enable defendant to establish and prove any title or right to the possession of a lode mining claim within the exterior boundaries of a patented placer claim, they must prove and show that there is found within the exterior boundaries of such lode claim the top, out-crop or apex of a lode or vein of quartz or other rock in place bearing gold, silver or other valuable deposits."

Counsel believes that the theory upon which the mining law is drawn is that all lode claims will be naturally located upon the apex or out-crop of a lode, for the reason that that part of the lode is the part which is found nearest the surface or protrudes from it, and is necessarily the part of the lode by which it will ordinarily be discovered. It is only the possession of this apex or out-crop which confers upon the lode claimant the right to follow the vein indefinitely into the earth within certain boundaries. Without possession of an apex a claimant under a lode location acquires no right to a vein which he may discover, by virtue of which he can eject any intruder upon that vein, or by which he can defend against the owner of the apex of the same vein should the apex thereof be found to lie without his boundary lines.

Iron Silver Co. vs. Cheesman, 116 U. S., 530.

It would then appear that without the possession of the apex or out-crop of a vein, no rights, which he can legally enforce, can accrue to a locator under a lode location so long as such a location has not ripened into an entry or patent. In order then to establish the right to possession of a lode mining claim and the

validity of its location, it is essential to show that the discovery of a lode has been made as contemplated by the law.

The discussion of the questions presented by the eleventh, twelfth and thirteenth assignments relied on is included in the arguments presented on the sixth assignment.

That the Court below erred in giving each and all of the instructions set forth in the fourteenth, fifteenth, sixteenth, seventeenth and eighteenth assignments relied on, is self-evident, because, in all of those instructions, the jury were told that if, at the *date of the issuance of the patent*, there was a lode known to exist within the placer, then that lode was excepted from the operation of the placer patent. This Court has already decided,

> Reynolds vs. Iron Silver Mining Co., 116 U. S., 687;
> Iron Silver Mining Co. vs. Reynolds, 124 U. S., 374;

that the date at which the knowledge must exist is the date of the *application* for the patent, and not the date of its *issuance*. The injustice of those instructions is most apparent, when it is considered that the evidence (Record 26) shows the date of the issuance of the patent to have been January 30th, A. D. 1880, and (Record 22) the date of application for patent November 13th, A. D. 1878. In the instruction quoted in the seventeenth assignment in this brief, the Court definitely fixed the date, to wit, February 1st, 1879, at which knowledge, on Moyer's part, would operate to defeat the patent, as far as it affects the lode known to exist, the Court evidently selecting that date because it was the date inserted by the locators of the Goodell lode themselves in their location certificate. (Record 29.) The locators might have inserted any date, and probable did insert a date, prior to the authentic date of its record, that would, in their opinion, serve to bring them within the exceptions of the placer patent.

In the instruction quoted in the nineteenth assignment in this brief, the Court, in effect, told the jury that it was not necessary that the location under which defendants in error claim should have been a valid one, when made, but that it was sufficient if, at any time thereafter, it should be made good, because the contest was not between two lode locations, but between a lode claim and a placer; that any visible and open so-called lode location upon the surface was, and is, good as against a placer claim, but would not be good as against other lode locations, thus creating in the

minds of the jury the impression that a peculiar sanctity attached to a lode location as against a placer, whether the lode location were valid or not. However thoroughly the Court below may be convinced concerning that sanctity, such a conviction does not change the law, as laid down to the contrary in a long line of decisions, in which this Court has reversed the same lower Court.

The twentieth assignment of error in this brief, quotes an instruction given on the subject of Moyer's knowledge of the existence of some lode, which is vaguely referred to but no where particularized throughout all the instructions given. As far as the instructions go, the lode referred to in them may be any lode in or under the placer, concerning which testimony was given. The frame of mind of the Court during the trial of the case is evidenced by the remarks of the Court to counsel (Record 32 and 33) which, together with the reply of counsel, were as follows :

"The Court: The defendant can put in evidence all he wishes as to the existence of a lode, and the knowledge of the patentee of it, with a view to make his record. If he can prove any other lodes tending to prove this one, that is to say, the purpose would be incorrect in general, but we all understand very well the theory in respect to this ground is, there is one lode going all through, so if he offers testimony to show that there are other lodes around there it tends to prove the existence of this lode.

"Counsel: Anything which is not a discovery and which they claim, they certainly have no right to attempt to prove, and they have no rights if they have no discovery; they must first prove a discovery before they can establish the existence of a claim.

"The Court: Well, sir, the theory upon which they proceed is that you never got this lode, being known to you. Whether they made a valid location of it or not is another question, but if it was known to the patentee at the time of the entry, whether located or not, their position is, and they are going to maintain in the Supreme Court, if they can, that you never got title to it by means of your placer patent."

In the remarks quoted, the Court virtually states that a theory *exists* in regard to the Moyer placer, which theory is, that "there is one lode going all through" the Moyer placer, and that defendants would not consequently be confined to proving the knowledge of the existence of the so-called vein exposed in the tunnel which crosses the Goodell and Gardiner locations, but might prove the existence of other veins in the vicinity, which proof would, in the opinion of the Court, "tend to prove the existence of this lode," which, in theory, "goes all through" the placer. Having thus in the beginning of the case pointed out the logical

and conclusive manner in which the existence of a lode, supposed to be the said theoretical lode, might be proved, the Court proceeded to outline and define defendants' position, and stated that what defendants "are going to maintain in the Supreme Court if they can" is, that plaintiff in error "never got title to that (theoretical) lode by means of the placer patent." It was upon this theory, and in this view of the case that the Court gave its instructions, and for that reason the instructions are so vague and indefinite, where the lode, which it is contended was known to exist, is mentioned in them. Counsel for defendants in error, (defendants below) naturally taking their cue from the Court, adopted the theory so said to exist, and conducted the case accordingly. The probabilities, however, are, as evidenced by the records in Reynolds vs. Iron Silver Mining Company (*supra*) and Iron Silver Mining Company vs. Campbell, *et al.*, now pending before this Court, numbered 222 on the docket of October term, 1888, and in which cases the same counsel appeared, that the only hope defendants had of proving knowledge in the patentee or any other person, of the existence of any lode or vein, was through evidence of developments made since 1878 at remote distances from the ground in controversy, upon veins or lodes, which defendants now assert are part of this same theoretical blanket lode which, it is said, "goes through" the whole country. The knowledge of the existence of this theoretical lode "going all through the ground" being conclusively (?) shown by the kind of evidence, the admission of which the Court itself acknowledged "would be incorrect in general," but asserted, would tend to prove the *existence* of that lode (a point not in issue, the question being one of knowledge), it was not difficult to arrive at the logical (?) conclusion that *knowledge* of the existence of a part is *knowledge* of the existence of the whole.

On such evidence and by such logic, a savage, gazing at a piece of meteoric iron, could be convicted of a knowledge of the exististence of the star of which it originally formed part.

If the defendants in error can be understood as contending for any one thing in the case before us, it may be imagined that they have striven to show that the Goodell and Gardiner locations are located upon veins which were known to exist by the patentee of the William Moyer at a time which would bring those veins within the exceptions of the placer patent.

The first evidence introduced was the deposition of George

Leonhardy (Record 33) who was, in spite of objections, asked, and permitted to answer a number of irrelevant questions about veins in the vicinity of the Moyer placer, and developments upon them. Not one question was asked him as to the territory embraced in the Goodell and Gardiner locations, or the developments claimed to have been made thereon. The only questions put to him at all bearing on the subject, were vague and indefinite (Record 37), the answers do not even tend to establish knowledge in the placer patentee of even the "vein or deposit of mineral ore *underneath*" the placer, mentioned in the leading questions put. It is said in one answer on that page that "wherever they sunk there they found mineral, you might say," but no place is mentioned where sinking was done on the Moyer placer. The remainder of Leonhardy's evidence relates to conversations had with Stevens regarding his (Stevens') geological theories and beliefs, which this Court has already decided to be incompetent.

Iron Silver Co. vs. Reynolds 124 U. S. 374.

The next witness was C. C. Baldwin (Record 41), who testifies that all the knowledge he had of the existence of any vein in the workings on the Goodell and Gardiner locations was acquired some thirty days before the giving of his testimony (Nov. 16th, 1885), although he had surveyed the Wells & Moyer placer adjoining the Moyer, in 1877, and had been "familiar" with both placers since that time, and states that the general understanding at that time was, that a vein was supposed to exist *under* the Moyer placer.

Michael Norris, the next witness (Record 44) testifies also, that he first knew the so-called veins in the tunnel crossing the Goodell and Gardiner claims "three or four weeks" before giving his testimony. Although he had lived in the vicinity since 1867 and himself, was the discoverer and locator of the Mike lode, which adjoins the Goodell and Gardner, he had never known of any vein or lode being discovered on the Moyer placer prior to the time he went into the tunnel in 1885.

John Hayes, one of the locators of the Goodell and Gardiner lodes, testified (Record 50), that he had helped to run the Mike tunnel 550 feet; that the intent and purpose of the tunnel was to intersect the Mike vein, which lies without the placer, and concerning which Norris testified; that in the tunnel they cut something which he dignifies by the name of veins, and which carried

gold, not lead and silver, as the contact vein of Leadville does, and as the veins before testified about do; that the walls of the so-called veins are porphyry (not lime and porphyry such as are supposed to characterize the theoretical vein spoken of); that they did not stop to locate the so-called veins, because they did not have money to locate veins then, although they had means to run the tunnel 400 feet; *that they closed and covered the mouth of the tunnel* (p. 57); that he did not remember that he told any of his friends when he cut the so-called veins, and as far as he remembered but one man aside from those interested with him (a Mr. Reeves) was ever in the tunnel.

The next and last witness was F. G. Bulkley (Record 61), who testified that he is by profession a civil and mining engineer; that he made the maps used; that at 78 feet from the mouth of the tunnel, and on the Gardiner claim, is found a crevice (called by the others a vein), having porphyry walls and a dip of 60°, and being filled "with a mixed mass of iron stained porphyry and clay"; that he is convinced that the crevice is a fault plane where the rock, by a geological movement, has broken, and one part has fallen and slid against the other; that at a distance of 156 feet from the mouth of the tunnel a gray porphyry is cut lying next to the white, making a contact of two different rocks, and which contains a streak or band of irony material, and that 278 feet from the mouth, the wash which covers the hill is again found in the tunnel; that *developments have shown* that the Moyer placer is underlaid by a contact vein (presumably the theoretical lode) which has a dip of six to fifteen degrees from the horizontal (certainly neither of the veins described as being cut in the tunnel). On cross-examination he said that he did not describe the crevice as a vein; that he has testified twenty-five or fifty times concerning the contact vein in Iron Hill, which presumably extends under the Moyer placer, and the apex of which lies outside that placer wherever it is, and upon other property belonging to plaintiff; that he was not prepared to say whether the crevice or seam was a vein or not or whether it connected with the contact vein or not. A glance at his small, square drawing in the left hand corner of the map containing the vertical section will show better than words why Mr. Bulkley did not call the crevice a vein.

The conclusion is irresistible that the intention of defendants is, if possible, to show that the so-called Goodell and Gardiner

lodes fall within the exceptions of the placer patent and thus to carve out for themselves a segment of this underlying vein which they never discovered and never saw within the boundaries of the Moyer placer, by proving, not knowledge of the existence of their so-called lodes, but knowledge of the existence of another lode which only presumably and theoretically underlies their claims and which they do not claim by right of discovery or location.

In regard to the twentieth assignment: The principle that the knowledge of Stevens was the knowledge of Moyer, is certainly unique when it is not invoked by a party interested asserting a relation of trust and confidence with either or between them. It is still more so when the only proof of Stevens' knowledge was evidence of conversations had with him concerning his theories and beliefs, which this Court has decided do not constitute knowledge. If such theories and beliefs do not constitute knowledge even in Stevens, how can they be said to do so in Moyer? Further comment on the instruction excepted to is unnecessary.

The judgment in this case is not supported by the evidence for the reason that the only legitimate object of the evidence was or could have been to establish the fact that the Goodell and Gardiner were lodes known to exist *within* the boundaries of the William Moyer placer at the date of the application for patent for the placer. This the evidence utterly and entirely fails to do.

This case, together with one of similar title, and numbered 232 upon the docket of this Court for the October term, 1888, were tried simultaneously upon the same evidence. This case is the adverse suit against defendants' application for patent for the Goodell lode, number 232, being the adverse suit against their application for patent to the Gardiner lode. The only difference in the transcripts of the record in the two cases is, that the name of the Goodell claim appears in the transcript in number 231, and that of the Gardiner in number 232. Both location certificates bear the same date and, except for the names of the lodes, each transcript is otherwise an exact copy of the other.

Counsel therefore asks that copies of this brief, which will be filed in number 232, may be considered as applicable to that case.

For the reasons stated herein, counsel contends that the decision of the Court below should be reversed, and a new trial awarded. Most respectfully submitted,

FRANK W. OWERS,

Dec. 31, 1888. *Of Counsel for Plaintiff in Error.*

Office Supreme Court U. S.
FILED.
MAR 15 1889
JAMES. H. McKENNEY.
CLERK.

# Supreme Court of the United States.

**OCTOBER TERM, 1888.**

THE IRON SILVER MINING COMPANY, *Plaintiff in Error*,
*vs.*
THE MIKE & STARR GOLD AND SILVER MINING COMPANY. } No. 231.

THE IRON SILVER MINING COMPANY, *Plaintiff in Error*,
*vs.*
THE MIKE & STARR GOLD AND SILVER MINING COMPANY. } No. 232.

*Error to the Circuit Court for the District of Colorado.*

BRIEF OF ASHLEY POND, OF COUNSEL FOR PLAINTIFF IN ERROR.

It appears by comparison of the records that these two cases are entirely similar.

In the court below the actions were ejectment, plaintiffs in error *vs.* defendant in error, to recover a tract or parts of a tract of land known as the "William Moyer placer claim;" trials by jury; verdicts and judgments for defendant.

The pleadings are word for word identical, with the exception that the answer in number 231 alleges the location of the "Goodell lode," and the answer in number 232 the

"Gardner lode." The evidence in both is identical, except that in the former case a certificate of the location of the "Goodell lode claim" appears, and in the latter a certificate of the location of the "Gardner lode claim." (The relative situation of these lode claims with reference to the placer claim will be seen by referring to the diagram found at page 63 of the Record.) The instructions asked and refused and the instructions given are word for word, in the same language, and it is evident that the trials were together, as if they were one case, except that separate verdicts were rendered. Hence I assume that they will be here heard together.

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By the record, which includes a bill of exceptions purporting to recite all the evidence, it appears:

(1.) That plaintiff deraigned title to the premises in controversy from a patent from the United States to one William Moyer of a tract of land known as the William Moyer placer claim, described in said patent by metes and bounds and as containing fifty-six and sixty-nine-hundredths acres, more or less. Said patent bears date January 4, 1880, and on the trial was shown to have been issued upon an application therefor made November 13, 1878.

(2.) That defendants based their defense upon the provisions contained in section 2333, Revised Statutes, and in two paragraphs of the placer-claim patent.

Said section 2333 is as follows, to wit:

"Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall

issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim and twenty-five feet or surface on each side thereof. The remainder of the placer claim or any placer claim not embracing any vein or lode claim shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings, and where a vein or lode such as is described in section twenty-three hundred and twenty is known to exist within the boundaries of a placer claim an application for a patent for such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim, but where the existence of a vein or lode in a placer claim is not known a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

And the paragraphs of the patent in question are as follows:

"First. That the grant hereby made is restricted in its exterior limits to the boundaries of the said lot No. 300, as hereinbefore described, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits which may hereafter be discovered within said limits and which are not claimed or known to exist at the date hereof."

"Second. That should any vein or lode of quartz or any rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits be claimed or known to exist within the above-described premises at the date hereof the same is expressly excepted and excluded from these presents."

(3.) That defendant pleaded such defense by allegations as follows, to wit:

(*a*.) That at the date of the application for said patent there was known to exist within the boundaries of the premises described therein a lode, vein, or deposit of min-

eral or quartz and other rock in place carrying carbonates of lead and silver.

(*b.*) That on February 1, 1879, one Hayes and others named, to whose rights defendants had succeeded, went upon said premises and, by a shaft, tunnel, and adit, uncovered said lode or vein and thereupon located thereon two lode mining claims, each three hundred by fifteen hundred feet in surface extent and respectively known as the "Goodell lode" and the "Gardner lode," and that defendants' alleged intrusion upon said placer claim was in working said lodes or veins.

(*c.*) That November 9, 1877, one Hayes and others named, to whose rights in the premises defendants had succeeded, discovered a vein of quartz and other rock in place bearing silver and other valuable minerals, and within three months thereafter duly located a mining claim thereon by the name of the Thomas Starr lode, and that their intrusion upon said placer claim was in working and mining said vein.

(4.) That defendants, in support of said allegations, gave in evidence:

(*a.*) In number 231, certificate of location of the so-called "Goodell lode claim," and in number 232, a certificate of location of the said "Gardner lode claim." Said certificates respectively bear date March 10, 1879. Each describes by metes and bounds a tract of land three hundred by fifteen hundred feet in surface measurement, and states that location was made February 1, 1879. The whole of the land so described lies within the boundaries of the William Moyer placer claim.

(*b.*) Testimony of certain witnesses, five in number, admitted, it would seem, upon a theory or assumption that it

tended to prove the allegation that a vein or lode of mineral rock in place was known to exist within the surface boundaries of the said William Moyer placer claim at the date of the application of patent for said claim.

No location certificate of the so-called Thomas Starr lode was introduced in evidence, but by other evidence in the case it appears that the said lode claim lies wholly without but adjoining the said placer claim.

Exceptions were taken by plaintiff's counsel to several rulings with reference to the admission of evidence and to the refusal of the court to give instructions asked and to the giving of instructions given.

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The instructions given were as follows (the numbering of the paragraphs is by me):

(1.) "The patent shown by plaintiff must prevail in these suits, unless it has been shown on the part of the defendant that there was a vein or lode in the territory covered by these locations which are called the Goodell and Gardner at the time of the issuance of the patent."

(2.) "There must have been a lode or vein in that territory known to the patentee, William Moyer, and there must have been locations made upon it as described in the pleadings and maps which have been put before you."

(3.) "The evidence tends to prove that the discovery of mineral in these claims was made in a tunnel some time in 1877, I believe. The locations were not made on the surface of the ground until 1879, about the first of February. That was after the application for patent and before the entry, which was about the 21st of February, 1879, and of course before the patent was issued."

(4.) "If there was a lode in that territory and it was known to Moyer as an existing lode at this time—and by this time I mean the first of February, 1879, or at the time these locations were said to have been made—and the lode

had been previously discovered by the locators of these claims, then the placer patent is not sufficient to convey them. In other words, they are excepted by the terms of this statute from the provisions of the patent, and the owners of that title now have no right to them."

(5.) "So that the question for your consideration is of that character, whether prior to the date of these alleged locations, which was in the early part of February, 1879, a lode was known to exist, or that Moyer knew of it at that time and that locations were made upon it."

(6.) "It has been said by counsel that if the lode had not been discovered in the discovery shafts that would defeat defendant's title and make good that of the plaintiff; but that is not true. It was not necessary that it should be a location upon which the plaintiff could have resisted the claims of parties who were claiming under lode locations. It was enough if it was a visible and open location upon the surface—one which might be made good thereafter, if not then good—and a lode was known to exist—known to Moyer. When the statute speaks of its being known it means known to the patentee."

(7.) "I would say something to you as to the question whether it was known to Stevens, who subsequently became the grantee of this claim, and not to Moyer; but I think the evidence tends equally to prove that it was known to Moyer if it was known to Stevens. Therefore I shall not raise any distinction upon that point. Perhaps there might be a distinction presented, but I do not think it is important in this case. If you find that it was known to Stevens I think that you may find upon the same evidence that it was known to Moyer. If it was not known to Moyer, then of course it matters not whether it was known to other people."

(8.) "The point upon this statute (section 2333) is that if the patentee of a placer claim—one who seeks to obtain a patent under a placer location—knows of the existence of a lode within the placer at the time of making his entry and obtaining his patent, does not include it in his application, does not proceed for that lode as a lode, hereby, under the terms of the statute, he makes a conclusive declaration that he has no right of possession of the lode, and that defeats his title altogether."

(9.) "I think that is all, gentlemen, that there is in the case. I do not know that it is necessary to repeat it again—

that the plaintiff's title must prevail unless it appear to you from the evidence that there was a lode existing in the ground and that Moyer knew it at the time of making his entry and obtaining his patent, and that a location had been made upon it in a general way; that there was a certificate made; that there was a discovery of mineral within the claims, and that the lode was staked upon the surface, and the like."

Exceptions to the giving of such instructions, paragraph by paragraph, were duly taken by plaintiff's counsel.

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The exceptions taken at the trial are made the basis of a large number of assignments of error, but I propose to discuss only the following:

ASSIGNMENTS OF ERROR.

1. Overruling the objection of plaintiff's counsel to the admission in evidence of the testimony of the witness Leonhardy as to conversations with Wm. H. Stevens and admitting the same in evidence. (Record pp. 38, 39.)

2. Giving to the jury the instructions above quoted.

I.

1. The testimony of Leonhardy in question was as follows:

Q. I will ask you, Mr. Leonhardy, if you are acquainted with W. H. Stevens.
A. I am.
Q. How long have you been acquainted with Stevens?
A. I have known him since '76.

Q. Has your acquaintance with him been intimate or otherwise?

A. It has been intimate.

Q. Did you ever have any conversation with Stevens about the premises included in the William Moyer placer patent in the spring of '77?

A. I have.

Q. When was that conversation?

A. That was at my house, in Riverside.

Q. State what that conversation was.

A. In the spring of '77 Mr. Stevens came to my house, and he had brought out a great many men from Detroit to work for him in California gulch, in that vicinity, and he stopped them over night, and while he was there he spoke very ill of the country; said the country wasn't worth anything. I finally told him that I thought that his actions belied his words. He wanted to know why. "Why," said I, "you are bringing out here three or four hundred men, paying their expenses out here, and I know that you are sharp enough not to lay out money that way unless you are going to have some returns for it." He then didn't say anything more until after breakfast. He told his men to get ready and go onto the road, and they went out. Some were in the house and some men were in the ambulance. He told them to hitch the horses in the ambulance and get ready, and he followed them out doors, and he came back and shut the door, and he told me he had staid there to have a long talk with me; and he said, "You may think it queer the way I am acting. The country is good—the best mineral country I ever saw—but if I told the men so, they would leave me as soon as they got up there and go on their own hook." Then he told me he had been there since '76, and what the result was, and what he had expended. He had sunk several locations—a great many—built houses—and expenses some thirty thousand dollars; how he had found an immense body of mineral underlying all that ground there; that he had shipped a great many tons; that they had netted him so much—the figures I forget, but they had paid him a handsome profit; that he was going up there to secure the ground, and begin very heavy operations shipping ore.

Q. State what he said, if anything, at the time about his

intention of locating territory upon the dip of the veins he had discovered.

A. Well, about, I should think, a week or two weeks afterwards—I don't know exactly—he got into trouble up there, and he concluded the atmosphere was better down below my house than it was up there. He came down; said they had treated him badly up there—the miners; that they were afraid he was going to gobble up the whole country. "But if I cannot do it in one way I will do it in another," he said; "I have spent more money up there than anybody else, and I am entitled to the ground."

Q. State what, if anything, he said on either of these occasions—his object to be in taking up large areas of territory.

A. So as to secure the mineral there was on it.

Q. What kind of mineral?

A. Carbonate mineral; they were shipping there at that time.

Q. In place?

A. In place.

On cross-examination the witness testified as follows:

1 X. Did Mr. Stevens ever say anything to you at this time you speak of about his having the top or apex of this vein?

A. He did not. We didn't know anything about apexes in those days.

2 X. Did he say anything about having an outcrop?

A. He simply told me he had prospected that country, and had found a great deal of mineral there throughout. It was underlying the whole conntry.

3 X. Did he say anything about the outcrop of any vein?

A. No, sir; he did not.

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It is difficult to discuss with seriousness the ruling which admitted this testimony. Nothing which the witness charges Stevens with saying indicates that he had the slightest knowledge of the existence of a vein or lode of mineral rock in

place or of any mineral of any character within the boundaries of the tract of land in controversy. The location of the territory which was the subject of the conversation is not defined. The only places mentioned are "California gulch and its vicinity." (Record, p. 38.) "Up there." (Record, p. 39.) And, on cross-examination, "the whole country." (Record, p. 40.) Moreover, it is clear that all that was said by Stevens was the mere expression of an opinion or theory that the country in that vicinity abounded in mineral. It is safe to say that millions of dollars have been invested and lost in the vicinity of Leadville upon the faith of like opinions and theories founded upon as reliable data as the evidence in this case shows Stevens could have then had with reference to the mineral character of the territory in question. Sad experience has demonstrated that in mining adventures at least it will not do to invest upon the theory that "faith is the substance of things hoped for" or "the evidence of things not seen."

In justice to the learned judge who presided at the trial below, it ought, perhaps, to be said here that such trial was before the decision of this court in the case of *Iron Silver Company* vs. *Reynolds*, 124 *U. S.*, 374, which would seem to be conclusive against the admission of the testimony under consideration.

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II.

The substance of the instructions to the jury assigned as errors is that if the jury should find that at the date of the location of the so-called Goodell and Gardner lode claims, to wit, February 1st, 1879, a lode of mineral rock in place was known to exist within that part of the Wm. Moyer placer claim included within said claims, then their verdict should be for the defendants.

These instructions are erroneous in several respects, to wit:

1. They are erroneous because they fix the date at which knowledge of the existence of a lode would result in exception of such lode from the placer patent after the application for such patent. *Iron Silver Mining Co.* vs. *Reynolds*, 124 U. S., 374.

2. They are erroneous because they fail to indicate to the jury that a vein or lode to be excepted from the patent must be a vein or lode so situated within the bounds of said placer claim as to make it possible to locate a lode claim within such boundaries which shall include within its limits the top or apex of such lode.

Under the instructions as given it was the duty of the jury to find their verdict for defendant if they should find that at the date of the location of the said Goodell and Gardner lode claims it was known that at some undetermined depth below the surface there extended under said claim and the portion thereof included in said Goodell and Gardner claims a vein or lode of mineral rock in place the top or apex of which it was known was not within the boundary of said claim but remained undiscovered.*

This, I submit, cannot be the effect upon the patent of section 2333 of the Revised Statutes or of the provisions of the patent above quoted.

The provisions of the patent are based upon said section of the statutes and must be so construed as to qualify or limit the grant only under the circumstances and to the extent to which by the terms of said section it is intended to be qualified or limited. *United States* vs. *Iron Silver Mining Co.*, 9 U. S. And the question is as to the meaning and scope of what is contained in said section 2333 R. S.—that is, under what circumstances or existing state of facts does this

* Or discovered and existing within a lode claim or lode claim already located and patented

section provide that the applicant for a patent for a tract of land which has been located as a placer mining claim shall take by the patent anything less than an absolute and unqualified title to the premises included within the metes and bounds by which said premises are described extended upwards and downwards.

It seems clear, beyond question, that the applicant for a patent for land as a placer claim is entitled to receive a patent, which shall convey to him an absolute and unqualified title to the entire premises—surface and below surface—described in his application, unless there exists within the exterior surface boundaries of said premises a vein or lode of rock in place, etc., which, at the date of his application, could be located as a vein or lode mining claim, which should include a portion of the surface of the premises within such boundaries.

The language of the section quoted is inconsistent with any other theory. By its very terms the applicant for a placer claim "within the boundaries of which is included a vein or lode" is required "to pay five dollars per acre for such *vein or lode claim* and twenty-five feet of surface on each side thereof," and the remainder of the placer claim—that is to say, the number of acres remaining after deducting the "lode claim"—is to be paid for "at the rate of two dollars and fifty cents per acre," and at that rate per acre "any placer claim not embracing any vein or lode claim" is to be paid for.

Now, the right to locate a vein or lode mining claim is given by section 2320* of the Revised Statutes, and by its

*SEC. 2320. * * * A mining claim located after the tenth day of May, 1872, whether located by one or more persons, may equal but shall not exceed one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface. * * *

provisions every such claim must be located longitudinally along the course or strike of the vein, and the location laterally, upon the surface, must extend on each side of the middle of the vein.

And it follows that only one vein or lode mining claim can be located so as to cover and include the same or any part of the same longitudinal section of a vein or lode—that is, no two or more vein or lode mining claims can be located parallel with each other upon the same vein or lode.

If claims should be so located and patents issue therefor, whatever might be the effect of such patents as to the surface, it is clear that only one could operate to give rights in or to the vein or lode, to wit, the one which should be found to cover the surface having within its boundary lines the middle—that is, the lateral center of the vein.

And this is, if possible, made still more clear and emphatic by the provisions of sec. 2322 of the Revised Statutes, which give the right to the locator of a vein or lode mining claim having the top or apex of the vein or lode within the longitudinal or side boundary lines of his claim to follow such vein or lode in its dip outside such side lines; for I submit that it is impossible that a vein or lode should have more than one middle or lateral center or more than one top or apex within the same longitudinal section, and that the middle or center of a vein or lode must be found where its top or apex is found and not elsewhere, because it is self-evident that to find the middle of a vein so as to be able to measure from it laterally on the surface of the ground you must first find the top of such vein.

And it follows that if the top or apex of a supposed vein or lode, the existence of which it is claimed the evidence tends to show, underlies the premises in question, is *found outside the exterior* surface boundaries of said premises, and that said vein or lode, if it so exists, underlies, as the evidence tends to show, the entire surface, it follows that no vein or lode claim could be located within said boundaries and that it

was not possible for the applicants for the placer patent to designate the location of the supposed vein or lode now in question so as to pay five dollars per acre for a "vein or lode claim" which should include it and "twenty-five feet of surface on each side thereof."

If one vein or lode claim could be located upon such vein within the boundaries of the placer claim by the same token the entire surface of such claim might be absorbed by the location of like claims, not longitudinally along the course of such vein, but at all sorts of angles with each other or parallel and side by side.

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3. They are erroneous because there was no evidence fairly tending to show that at the time of the application for the patent for said placer claim or at the time of the location of the said Goodell and Gardner claims there was known to exist within the boundaries of said placer claim any vein or lode of mineral rock in place.

Before proceeding to examine and analyze the evidence which the record dicloses was admitted and acted upon by the court upon the theory or assumption that it tended to prove such known existence of a vein or lode, let us for a moment consider the nature and quantum of the evidence required in that behalf.

It is clear from the terms of the placer patent that the application upon which it issued did not disclose the existence of any vein or lode within the boundaries of the land described and that the grantee paid by the acre for the entire 56.69 acres included within said boundaries, and hence *prima facie* at least said patent vested in its grantee title to the entire of said 56.69 acres, and said title was not held subject to any presumption that any fact existed which

might defeat such title to any portion of said land either surface or below surface.

If any such fact could exist and was claimed to exist the burden was upon the party setting up such a claim to prove its existence.

Now, the fact alleged in that regard in this case, to wit, that at the time the application for said patent was made there was known to exist within the boundaries of said land a vein of mineral rock in place carrying silver and lead, from the very nature of the case could only be proved by proof of what was known at the date in question. *U. S.* vs. *Iron Silver Co.*, 128 *U. S. Rep.*, 673.

It is also clear that the evidence to show the known existence of such vein or lode must prove that at the date in question the *facts known conclusively proved the existence of such vein or lode;* because it is self-evident that one cannot be charged with knowing at a certain time the existence of a specific fact by proof only that he knew the existence of a fact or facts which pointed to the existence of the fact in question but which were nevertheless consistent with its non-existence.

"It is not enough that there may have been some indications by outcroppings on the surface of the existence of lodes or veins of rock in place bearing gold or silver or other metal to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation."

*Per Field, J., in U. S. vs. Iron Silver Co., supra.*

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In the light of these principles let us examine the evidence supposed to bear upon the question now under discussion.

It is all found in the testimony of witnesses as follows, to wit:

1. *Leonhardy*, Record, pp. 38–41: Not a syllable on the subject of developments or discoveries within the boundaries of the Wm. Moyer placer. His conversations with Stevens I have already quoted and commented on. After describing his acquaintance with and examination of other mines and locations, principally if not wholly in the vicinity, not of the William Moyer, but of the Wells and Moyer placer, he is interrogated and answers as follows:

Q. State whether or not, during the times or any of them that you have mentioned,* there was any knowledge among the people in that vicinity or neighborhood as to the existence or non-existence of any vein or deposit of mineral ore underneath the premises now known as the William Moyer placer claim.

A. There was.

Q. State what that knowledge was—that is, as to whether there was or was not.

A. There was knowledge that there was mineral; wherever they sunk there they found mineral, you might say.

*Baldwin*, Record, pp. 41, 42. At page 42:

Q. Mr. Baldwin, did you ever examine the Mike tunnel, so called?

A. Yes, sir.

Q. What is the direction of it with reference to the Goodell and Gardiner lodes?

A. It runs in an easterly direction, and cutting the Goodell and Gardiner locations at nearly a right angle.

Q. Mr. Baldwin, did you examine that tunnel with reference to whether there was a vein disclosed in it or not?

A. Yes, sir.

Q. State whether there was or not.

A. Yes, sir; there were several veins exposed in the course of the tunnel.

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*He had mentioned times extending from 1866 to 1872.

Q. Point out the tunnel there on the map, and point out the location of the veins as near as you can.

A. This represents the tunnel running in an easterly direction on to this point, being about—its length is about four hundred feet. At this point, about seventy-five feet in from the mouth, was disclosed a lode with porphyry walls or at least a porphyry wall on the west side, dipping to the east *and a vein showing decomposed porphyry, with some pieces of iron at different points in the lode.* The eastern wall was not as perfectly defined as the west wall. Then there were other lodes found further in the tunnel. I forget their exact distances from the mouth.

The COURT: When was that tunnel made?

Mr. REED: It was begun in January, 1877, and finished in the fall.

The COURT: Does he say he examined it at the time this survey was made?

Q. When did you examine it before, if you did?

A. I never was in the tunnel until about a month ago.

Q. The first you knew of those veins was a month ago?

A. Yes, sir.

Q. What did you see then as to there being disclosed there a defined vein in rock, in place?

A. I considered it a well-defined vein in rock, in place.

Q. You don't know when it was discovered?

A. No, sir.

Q. State, if you know and are acquainted with that hill, what its general characteristics are, as to a vein, compared with the hill where the Wells and Moyer placer is, as to the contact

A. Well, the contact exists under portions; it has been developed under portions of this hill and presents the same features as the Wells and Moyer placer.

Q. The same kind of a vein?

A. Yes, sir.

Q. The same dip?

A. Nearly the same.

Q. What was the general understanding, if there was one at the time, about there being a vein under that Moyer placer?

A. It was supposed to exist there.

This testimony, I submit, falls far short of tending to show the existence within said Goodell and Gardner locations of a vein or lode of rock, in place, "carrying carbonates of silver and lead."

The only vein the character of which he describes is one showing "decomposed porphyry with some pieces of iron at different points." The fact to which he testifies, that a vein was "supposed to exist under the Moyer placer," can scarcely be characterized as evidence tending to prove such existence.

3. *Michael Morris*, Record, pp. 44–50:

His testimony as to veins or lodes within the placer claim is found on pages 45 and 46, and is as follows:

Q. Do you know the Goodell and Gardner lodes?
A. Well, I am not very well acquainted with them.
Q. Do you know the tunnel called the Mike tunnel?
A. Yes, sir.
Q. Do you know of any discoveries of lodes in that tunnel?
A. Yes, sir; three, I guess.
Q. Can you indicate on the map about where they are; have you looked at that map that is standing up there?
A. Yes, sir.
Q. Just take the pointer, please, and point out where those lodes are and describe them.
A. The first one, I think, is in here.
Q. Describe that place.
A. I think that is the biggest one; *the west wall there has some iron.*
Q. *What is the character of the filling of the vein, if there is any?*
A. *Decomposed porphyry, manganese, iron.*
Q. *Do you know whether it ever carried any mineral or not, of your own knowledge?*
A. *Not to my knowledge.*
Q. You never worked it?
A. No, sir.
Q. About how wide do you say it was?

A. I should say it was between three and four feet wide.
Q. Is it in solid rock or in wash?
A. Solid rock.
Q. When did you see it first?
A. About three or four weeks ago.
Q. Now, the other veins in there?
A. Well, the others are smaller; they are further to the east.
Q. Look at the map down below there—that sectional map of the tunnel; did you examine that tunnel running in there, showing the surface of the ground; do you know anything about that; have you examined that?
A. No, sir, I have not.
Q. How far in is the second vein from the first one?
A. Well, I couldn't say exactly.
Q. Well, about how far?
A. About seventy or eighty feet.
Q. How is that with reference to being located or found in solid rock; what are the walls of it?
A. The walls are porphyry.
Q. It is a vein, then, in porphyry?
A. Yes, sir.
Q. *What is found in the vein that indicates that it is a vein—what kind of mineral?*
A. *Decomposed porphyry and soft material—some iron.*
Q. *You never examined that with reference to panning it?*
A. *No, sir.*

Immediately following this testimony from pages 46 to 51 of the Record this witness testifies to conversations with Moyer which it was afterwards discovered related to the Wells and Moyer and not to the William Moyer placer, and was accordingly stricken out.

The testimony of this witness is subject to the same criticism made above on the testimony of Baldwin.

*John Hayes,* Record, pp. 50–57. This witness was one of the locators of the Goodell and Gardner lode claims, and testified that he and his partners ran the Mike tunnel, and then as follows:

Q. Did you discover in that Mike tunnel any veins?

A. I did discover a vein in that Mike tunnel; I struck the pick into it myself.

Q. When?

A. We discovered it about the 15th or 16th of February, 1877.

Q. How far from the mouth of the tunnel was that—about how far?

A. Oh, about seventy-five feet.

Q. Could you point out there on the map where it is?

A. Yes; that is about the point.

Q. Now, how much of a vein was that? Describe it.

A. Well, it was about eighteen inches wide.

Q. Describe the vein as to the walls and sides of it and what was in it.

A. Well, it was two porphyry walls was with the vein. *It was decomposed quartz and a clay and vein matter*, and I don't know if I could describe the vein any better than that much. I haven't found out the vein matter myself, and have got several colors of gold in it, and my brother was the territorial assayer of Colorado at that time—he is dead now—and he had it assayed several times, and he got from a trace to three-quarters of an ounce of gold in it.

Q. Where was that; who panned it?

A. That was in 1877. We started that tunnel the thirteenth day of January, 1877, and that year—and we worked in it right along day and night until the 12th of April, 1877.

Q. Now, did you discover any other vein?

A. Yes, sir.

Q. Where was that?

A. Well, we discovered a vein somewheres in about here, about two hundred feet from the mouth of the tunnel.

Q. Look at this other map and see if you can point it out there—the map below the one you have been using—that sectional map.

A. I don't know. I haven't seen that map before. I believe I looked at it once, and that was all, and I didn't take any particular notice of it.

Q. Now, state the next vein that you discovered. You have mentioned two now; did you ever discover any other?

A. Yes, sir; we discovered—there is four veins there.

Q. Now, what is the vein nearest the end of the tunnel?

A. Well, that one; that is a little over two hundred feet from the mouth of it; is nearest to the end of the tunnel.

Q. Now, what kind of a vein is that?

A. It is similar to the first one. Well, the first one is more decomposed, the porphyry, the walls of it. This last one we have got here is what we call block porphyry—more solid porphyry.

Q. State whether it is well defined and whether the walls enclosing it are in position.

A. Yes, sir; it is well defined and has two regular walls.

Q. That you discovered in running the tunnel.

A. That is what I discovered in running the tunnel.

*On cross-examination, page* 54:

Q. Will you tell us what kind of a vein it was?

A. It was a vein existing in the porphyry.

Q. Did it have porphyry walls?

A. Yes, sir.

Q. And it was a decomposed matter between porphyry?

A. It was decomposed quartz and shale. Well, the vein—I am not a mineralogist. I can't just explain to you—it was a vein.

Q. I want you to explain it as a miner. *Tell us whether or no there were placer mines near there before this.*

A. *Before; yes, sir.*

Q. *And gold dust had been taken out very near to where you sank this shaft and commenced this tunnel?*

A. *Yes, sir.*

*On pages* 55, 56:

Q. Did you at that time tell any one of your friends, in talking about that tunnel, that you found a vein that you thought was of any value and worth locating upon?

A. I disremember whether I told a person anything about that or not.

Q. Did you have an opinion at that time that you had found any vein or deposit that was worth locating or claiming?

A. Yes, sir; I did have an opinion that it was worth locating.

Q. You did?

A. Yes, sir.

Q. Did you think you could mine upon that vein and make anything taking out ore?

A. If I could afford for to sink it at that time I think it would improve as I went in depth. No; *I could not mine from the first where we struck. It wouldn't pay where we struck it.*

*At page* 56:

Q. Mr. Hayes, do you know the discovery shafts of the Goodell and Gardiner lode claims—the location on which those claims were made?

A. Yes, sir.

Q. Have you been in them?

A. Yes, sir.

Q. *Is there any discovery of any vein or lode or valuable mineral deposits within them?*

A. *Not in them discovery shafts; no, sir; if that is what you want to get at.*

No comments seem necessary.

*Fred. G. Bulkley, pp.* 57–63:

This witness was called as a mining expert and testified with reference to an examination he had then recently made of the so-called Mike tunnel. So far as the question now under consideration is concerned, it is sufficient to quote from his cross-examination, page 60.

Q. Mr. Bulkley, what kind of a vein is that that you have described in the tunnel?

A. I haven't described it as a vein. In speaking of it I used the term vein inadvertently once, because, while it possesses such characteristics of a vein as will be determined upon inspection, other characteristics, I think, would have to be determined by analysis. For instance, it has the general indication of lateral extent and extent in depth—that is, it has a very considerable lateral extent in the direction of the strike and dip. The material which is enclosed in it—I have brought a piece with me—it looks very much as though it would carry silver and possibly some gold, but to

speak positively upon that point is more than I can do. I venture to say it looks like it, and most any miner will agree with me.

I have intended to state, and I believe I have fully and fairly stated, all the evidence in the record which can be plausibly contended to make in defendants' favor upon the question under consideration, and I submit that it falls far below the necessities of the defendants' case.

It does not disclose the discovery prior to the date of the application for the placer patent of any indications or outcropping on the surface of the placer claim of the existence of a lode or vein of rock in place bearing gold, silver, or other metal.

It does not disclose knowledge at the time of the existence of any such vein or lode within adjacent premises such as to indicate with even reasonable probability, much less conclusively, the existence of any vein or lode within said placer claim.

The only development within said placer claim which it discloses is the running of the so-called Mike tunnel, and it shows that this tunnel was run for the purpose of discovering or reaching mineral which was supposed to have been discovered in an adjoining claim, and the alleged discovery of veins or lodes within the placer claim by running this tunnel is not shown to be such as to "render the land more valuable on that account and justify their exploitation." These alleged discoveries were made early in 1877, and there is no pretense that there was any attempt to locate lode claims upon them until two years later, or that a pound of mineral was ever obtained from them, and it appears that no minerals were disclosed by the discovery shafts which were the basis of the locations of said lode claims.

It should perhaps be stated that there are allusions in the testimony to a so-called "blanket" vein, theorized to extend in its dip under a large area of country, including the Wil-

liam Moyer placer claim; but there is no evidence that said vein was prior to the application for the placer patent or is now *known* to extend under said placer claims, nor is there any evidence that the intrusion of the defendants upon the premises in controversy consisted in removing mineral from this supposed vein, and it seems to be conceded that *the apex of said* supposed vein is *outside said placer claim.*

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I submit that the judgment below must be reversed.

ASHLEY POND,
*Of Counsel for Plaintiff in Error.*